(17)

No. 05-85
Title: Powerex Corp., Petitioner
v.
Reliant Energy Services, Inc., et al.
Docketed: July 18, 2005
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (02-57200, 02-57202, 02-57210, 03-55118, 03-55131, 03-55176, 03-55241, 03-55249, 03-55266, 03-55319, 03-55322, 03-55349)
Decision Date: December 8, 2004
Rehearing Denied: March 3, 2005
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
May 20 2005	Application (04A985) to extend the time to file a petition for a writ of certiorari from June 1, 2005 to July 1, 2005, submitted to Justice O'Connor.
May 23 2005	Application (04A985) granted by Justice O'Connor extending the time to file until July 1, 2005.
Jun 20 2005	Application (04A985) to extend further the time from July 1, 2005 to July 31, 2005, submitted to Justice O'Connor.
Jun 22 2005	Application (04A985) granted by Justice O'Connor extending the time to file until July 15, 2005.
Jul 15 2005	Petition for a writ of certiorari filed. (Response due August 17, 2005)
Jul 15 2005	Appendix of Powerex Corp. filed.
Jul 29 2005	Waiver of right of respondent PPL Montana, LLC to respond filed.
Aug 2 2005	Waiver of right of respondent Portland General Electric Company to respond filed.
Aug 5 2005	Waiver of right of respondent Morgan Stanley Capital Group Inc. to respond filed.
Aug 8 2005	Brief of respondent Reliant Energy Services, Inc. in support of the petition filed.
Aug 11 2005	Waiver of right of respondents Arizona Electric Power Cooperative, Inc., et al. to respond filed.
Aug 15 2005	Waiver of right of respondent MIECO, Inc. to respond filed.
Aug 15 2005	Waiver of right of respondents Sempra Energy Trading, Corp., et al. to respond filed.
Aug 16 2005	Waiver of right of respondents California, et al. to respond filed.
Aug 17 2005	Motion for leave to file amicus brief filed by Province of British Columbia.
Aug 17 2005	Motion for leave to file amicus brief filed by Government of Canada.
Aug 31-2005	DISTRIBUTED for Conference of September 26, 2005.
Sep 7 2005	Response Requested . (Due October 7, 2005)
Oct 3 2005	Order extending time to file response to petition to and including December 6, 2005.
Dec 6 2005	Brief of Plaintiffs and Respondents in opposition filed.
Dec 20 2005	Reply of petitioner Powerex Corp. filed. (Distributed)
Dec 21 2005	DISTRIBUTED for Conference of January 6, 2006.
Jan 5 2006	Supplemental brief of plaintiffs and respondents in opposition to petition filed. (Distributed)
Mar 22 2006	DISTRIBUTED for Conference of April 14, 2006.
Apr 17 2006	The Solicitor General is invited to file a brief in this case expressing the views of the

United States.

Nov 14 2006 Brief amicus curiae of United States filed. VIDED.

Nov 21 2006 DISTRIBUTED for Conference of December 7, 2006.

Nov 27 2006 Response of plaintiffs and respondents to brief of United States as amici curiae filed.

Dec 27 2006 DISTRIBUTED for Conference of January 12, 2007.

Jan 16 2007 DISTRIBUTED for Conference of January 19, 2007.

Jan 19 2007 Motion for leave to file amicus brief filed by Province of British Columbia GRANTED.

Jan 19 2007 Motion for leave to file amicus brief filed by Government of Canada GRANTED.

Jan 19 2007 Petition GRANTED limited to Question 1 presented by the petition. In addition, the parties are directed to brief and argue the following Question: Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U. S. C. Sec. 1447(d).

Feb 5 2007 SET FOR ARGUMENT ON Monday, April 16, 2007.

Feb 13 2007 Letter from counsel for respondent PPL Montana, LLC waiving their right to file a brief on the merits.

Feb 16 2007 Joint appendix filed.

Feb 16 2007 Brief of petitioner Powerex Corp. filed.

Feb 20 2007 Record received from U.S.D.C. for Southern District of California. (2 boxes)

Feb 20 2007 Letter from counsel for respondents Arizona Electric Power Cooperative, Inc., et al. waiving their right to file a brief on the merits.

Feb 21 2007 Record received from U.S.C.A. for 9th Circuit. (1 box)

Mar 2 2007 Letter from counsel for respondent Reliant Energy Services, Inc. waiving their right to file a brief on the merits.

Mar 5 2007 Brief amicus curiae of Government of Canada filed.

Mar 5 2007 Brief amicus curiae of United States filed.

Mar 5 2007 Brief amicus curiae of Province of British Columbia filed.

Mar 7 2007 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Mar 16 2007 CIRCULATED.

Mar 19 2007 Extension of time within which to file respondents' brief on the merits to and including March 26, 2007.

Mar 23 2007 Brief amici curiae of Law Professors Arthur R. Miller, Erwin Chemerinsky, Michael E. Solimine, Adam N Steinman, E. Farish Percy, and Rhonda Wasserman filed. (Distributed)

Mar 26 2007 Brief of respondents Plaintiffs-Respondents filed. (Distributed)

Apr 2 2007 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Apr 6 2007 Reply of petitioner Powerex Corp. filed. (Distributed)

Apr 16 2007 Argued. For petitioner: David C. Frederick, Washington, D.C.; and Douglas Hallward-Driemeier, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondents: Leonard B. Simon, San Diego, Cal.

Supreme Court, U.S.
FILED
05-85 JUL 15 2005
OFFICE OF THE CLERK

No. ____

IN THE
Supreme Court of the United States

POWEREX CORP.,
Petitioner,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 15, 2005

Counsel for Powerex Corp.

QUESTIONS PRESENTED

1. Whether an entity that is wholly and beneficially owned by a foreign state's instrumentality, and whose sole purpose is to perform international treaty and trade agreement obligations for the benefit of the foreign state's citizens, may nonetheless be denied status as an "organ of a foreign state" under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1603(b)(2), based on an analysis of sovereignty that ignores the circumstances surrounding the entity's creation, conduct, and operations on behalf of its government.

2. Whether an entity is an "organ of a foreign state" under the FSIA when its shares are completely owned by a governmental corporation that, by statute, performs all of its acts as the agent of the foreign sovereign.

PARTIES TO THE PROCEEDINGS

Petitioner Powerex Corp. was a cross-defendant/appellant/appellee in the district court and court of appeals proceedings.

The following also were parties to the district court and court of appeals proceedings and are respondents in this Court:

AES Corporation was a defendant

AES Redondo Beach, LLC was a defendant

AES Alamitos, LLC was a defendant

AES Huntington Beach, LLC was a defendant

Arizona Electric Power Cooperative, Inc. was an intervenor/cross-defendant/appellee

Arizona Public Service Company was a cross-defendant/appellee

Automated Power Exchange, Inc. was a cross-defendant/appellee

Avista Energy, Inc. was an intervenor/cross-defendant/appellee

Bonneville Power Administration was a cross-defendant/appellant/appellee

Borrego Water District was a plaintiff

British Columbia Hydro and Power Authority was a cross-defendant/appellee

Cruz M. Bustamante was a plaintiff/appellee

Cabrillo Power I, LLC was a defendant/appellee

Cabrillo Power II, LLC was a defendant/appellee

City and County of San Francisco was a plaintiff

City of Los Angeles Department of Water and Power was a cross-defendant/appellee

City of Oakland was a plaintiff

Commission de Federale Electricidad was a cross-defendant/appellee

Constellation Power Source (now Constellation Energy Commodities Group) was a cross-defendant/appellee

County of Santa Clara was a plaintiff

Mary L. Davis was a plaintiff

Department of Energy was a cross-defendant/appellee

Duke Energy Morro Bay, LLC was a defendant/cross-claimant/appellant/appellee

Duke Energy Moss Landing, LLC was a defendant/cross-claimant/appellant/appellee

Duke Energy Oakland, LLC was a defendant/cross-claimant/appellant/appellee

Duke Energy South Bay, LLC was a defendant/cross-claimant/appellant/appellee

Duke Energy Trading and Marketing, LLC was a defendant/cross-claimant/appellant/appellee

Dynegy, Inc. was a defendant

Dynegy Marketing and Trade was a defendant

Dynegy Power Marketing, Inc. was a defendant

El Segundo Power, LLC was a defendant/appellee

Fallbrook Public Utility District was a plaintiff

General Public of the State of California was a plaintiff/appellee

Pamela R. Gordon was a plaintiff/appellee

Hafslund Energy Trading LLC was a cross-defendant/appellee

Helix Water District was a plaintiff

Ruth Hendricks was a plaintiff/appellee

Barry H. Himmelstein was a plaintiff/appellee

IDACORP Energy, L.P. was an intervenor/cross-defendant/appellee

Idaho Power Company was an intervenor/cross-defendant/appellee

Patrick N. Keegan was a plaintiff/appellee

Long Beach Generation, LLC was a defendant/appellee

Barbara Mathews was a plaintiff/appellee

Metropolitan Transit Development Board was a plaintiff

MIECO, Inc. was a cross-defendant/appellee

Mirant Americas Energy Marketing L.P. (fka Southern Company Energy Marketing, L.P.) was a defendant

Mirant California, LLC (fka Southern Energy California, LLC) was a defendant

Mirant Delta, LLC (fka Southern Energy Delta, LLC) was a defendant

Mirant, Inc. (fka Southern Energy, Inc.) was a defendant

Mirant Potrero, LLC (fka Southern Energy Potrero, LLC) was a defendant

Morgan Stanley Capital Group Inc. was a defendant

Nevada Power Company was a cross-defendant/appellee

Northern California Power Agency was an intervenor/cross-defendant/appellee

NRG Energy, Inc. was a defendant/appellee

Oscar's Photo Lab was a plaintiff

PacifiCorp was a cross-defendant/appellee

PacifiCorp Power Marketing Inc. was a cross-defendant/appellee

Padre Dam Municipal Water District was a plaintiff

People of the State of California was a plaintiff/appellee

PG&E Energy Trading Holdings Corporation was a defendant

PG&E Energy Trading-Power, L.P. was a defendant

Pier 23 Restaurant was a plaintiff/appellee

Plant General Electric Company was a cross-defendant

Portland General Electric Company was a cross-defendant/appellee

PP&L Montana, LLC was a cross-defendant/appellee

Public Service Company of New Mexico was a cross-defendant/appellee

Puget Sound Energy, Inc. was an intervenor/cross-defendant/appellee

Ramona Municipal Water District was a plaintiff

Reliant Energy Coolwater, Inc. (fka Reliant Energy Coolwater, LLC) was a defendant/cross-claimant/appellant/appellee

Reliant Energy Ellwood, Inc. (fka Reliant Energy Ellwood, LLC) was a defendant/cross-claimant/appellant/appellee

Reliant Energy Etiwanda, Inc. (fka Reliant Energy Etiwanda, LLC) was a defendant/cross-claimant/appellant/appellee

Reliant Energy Mandalay, Inc. (fka Reliant Energy Mandalay, LLC) was a defendant/cross-claimant/appellant/appellee

Reliant Energy Services, Inc. was a defendant/cross-claimant/appellant/appellee

Reliant Ormond Beach, Inc. (fka Reliant Ormond Beach, LLC) was a defendant/cross-claimant/appellant/appellee

Sacramento Municipal Utility District was an intervenor/cross-defendant/appellee

Salt River Project Agricultural Improvement and Power District was an intervenor/cross-defendant/appellee

San Diego Transit Corporation was a plaintiff

San Diego Trolley, Inc. was a plaintiff

Sempra Energy, Inc. was a defendant/appellee

Sempra Energy Resources was a defendant/appellee

Sempra Energy Trading was a defendant/appellee

Sierra Pacific Industries was an intervenor/cross-defendant/appellee

Sierra Pacific Power Company was a cross-defendant/appellee

Sierra Pacific Resources was a cross-defendant/appellee

Silicon Valley Power (City of Santa Clara) was an intervenor/cross-defendant/appellee

Sunlaw Cogeneration Partners I (now Sunlaw Energy Partners I, L.P.) was a cross-defendant/appellee

Sweetwater Authority was a plaintiff/appellee

Trans Alta Energy Marketing Company was an intervenor/cross-defendant/appellee

Trans Canada Power Company was a cross-defendant

Tucson Electric Power Company was an intervenor/cross-defendant/appellee

United States of America was a cross-defendant/appellee

Valley Center Municipal Water District was a plaintiff

Vista Irrigation District was a plaintiff

Western Area Power Administration, Colorado River Storage Project, was a cross-defendant/appellee

The Williams Companies, Inc. was a defendant

Williams Energy Marketing & Trading Co. was a defendant

Williams Energy Services Co. was a defendant

Yuima Municipal Water District was a plaintiff

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Powerex Corp. states the following:

Powerex Corp. is a Canadian corporation incorporated under British Columbia's Company Act. Powerex is wholly owned by the British Columbia Hydro and Power Authority, which is a Provincial Crown Corporation owned in its entirety by Her Majesty the Queen in right of the Province of British Columbia. No publicly held company owns any Powerex stock.

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Powerex Corp. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

This case raises issues of immediate significance to the well-established practice of "governments throughout the world" using "separately constituted legal entities" to perform inherently sovereign functions. *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 624 (1983). The Ninth Circuit erred in construing two aspects of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602 *et seq.* (the "FSIA"): first, in a decision that directly conflicts with the judgments of the Second, Third, and Fifth Circuits, the court defined an "organ of a foreign state or political subdivision" under § 1603(b)(2) in a mechanistic way that excludes pertinent evidence of the foreign sovereign's purpose in establishing the entity to perform international treaty and cross-border trade functions. Second, the Ninth Circuit created a test for a foreign state's ownership of a government corporation that ignores an agency relationship expressly created by statute. In addition to creating judicial conflicts, both holdings undermine Congress's purpose in enacting the FSIA to establish a uniform platform for international trade and relations with the United States that respects the substantive and procedural protections that all sovereign nations reasonably expect.

In this case, petitioner Powerex Corp. ("Powerex") was concededly created by the Province of British Columbia to sell electricity in the United States for the sole benefit of the Province from hydropower resources wholly owned and operated by the Province, and was likewise tasked by the Province to fulfill international treaty obligations that the Province (and Canada) agreed to perform with the United States. In a decision that defies the law, the facts, and common sense, the Ninth Circuit held that Powerex was *not* a foreign sovereign while simultaneously holding that

a United States entity performing the same functions under the same treaty is a *domestic* sovereign.

The Ninth Circuit's discordant holdings deny Powerex its right under the FSIA to remove this suit from state court and to enjoy the procedural protections (including the right to a bench trial) that Congress has afforded to foreign sovereigns under the FSIA. Because this case has profound effects on U.S.-Canada bilateral relations, the proper interpretation of the FSIA, and the commercial dealings of numerous foreign sovereign entities within the United States, this petition should be granted.

OPINIONS BELOW

The district court's opinion granting plaintiffs' motion to remand (Pet. App. 18a-44a) is unreported. The court of appeals' opinion (*id.* at 1a-17a) is reported at 391 F.3d 1011.

JURISDICTION

The court of appeals entered its judgment on December 8, 2004. A petition for rehearing en banc was denied on March 3, 2005. Pet. App. 45a. On May 23, 2005, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including July 1, 2005, *id.* at 215a, and on June 22, 2005, further extended the time for filing to and including July 15, 2005, *id.* at 216a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATY & STATUTORY PROVISIONS INVOLVED

Relevant treaty and statutory provisions are set forth at Pet. App. 61a-214a.

STATEMENT OF THE CASE

1. This case arises out of consolidated actions originally filed in California state court by a class of plaintiffs (respondents here) against a number of defendants (also respondents here), including Reliant Energy Services, Inc. ("Reliant") and Duke Energy Trading and Marketing, LLC ("Duke"). Reliant and Duke are independent generators that sold power in the California wholesale electricity markets. The proposed plaintiff class consists of "all per-

sons and other entities in California who purchased electricity from [San Diego Gas & Electric, Southern California Edison, or Pacific Gas & Electric] for purposes other than resale or distribution since January 1, 1999." C.A. ER (PWX) 0019-0020, ¶ 72. The respondent-plaintiffs allege that defendants violated California's Cartwright Act and Unfair Competition Law by acting in concert to withhold supply, create artificial shortages, and manipulate prices in California electricity markets. *See* Pet. App. 7a. Powerex was not named as a defendant by plaintiffs.

Reliant filed a cross-complaint against Powerex, the British Columbia Hydro and Power Authority ("BC Hydro"), other alleged market participants, and two federal agencies, the Bonneville Power Administration ("BPA") and the Western Area Power Administration ("WAPA"). Duke also filed a cross-complaint against Powerex, BPA, WAPA, and several other entities, but not BC Hydro. The cross-complaints alleged that the cross-defendants sold power in significant amounts at the prices complained of by the plaintiffs and that the cross-defendants participated in the bidding process by which market prices were set in the California Power Exchange and California Independent System Operator organized markets.

Powerex and BC Hydro removed the action to district court as foreign states under 28 U.S.C. §§ 1441(d) and 1603(a) of the FSIA. The federal agency defendants, BPA and WAPA, also removed the case as federal "officer[s]" or "agenc[ies]" under § 1442(a)(1). The plaintiffs moved to remand, which Powerex and others opposed.

2. The undisputed evidence adduced in the district court demonstrated the following:

In 1961, Canada and the United States signed the Columbia River Treaty (the "Treaty"),[1] under which Canada agreed to construct reservoir facilities in Canada to con-

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[1] Treaty Between the United States of America and Canada Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, 15 U.S.T. 1555 (Pet. App. 61a-137a).

trol the flow of the Columbia River in a way that would enable the United States to generate more power at its existing facilities on the Columbia River ("Downstream Benefits") and to provide enhanced flood control benefits to the U.S. Treaty Art. II (Pet. App. 63a-64a). In return, Canada received a right to half of the Downstream Benefits over the 60-year life of the Treaty (the "Canadian Entitlement"). *Id.* Art. V, § 1 (Pet. App. 66a). Canada and the United States were required to appoint "entities" to administer the Treaty. *Id.* Art. XIV, § 1 (Pet. App. 74a).

In 1962, the British Columbia Provincial Government passed the British Columbia Hydro and Power Authority Act to establish an entity in which to hold assets it acquired and to promote major hydroelectric development, which included construction of significant storage dams and hydroelectric generating capacity on the Peace and Columbia River Systems (the "Two River Policy"). In 1964, the Provincial Government enacted another British Columbia Hydro and Power Authority Act ("Hydro Act"), which created the Provincial Crown Corporation known today as BC Hydro. *See* Pet. App. 7a. The Act enumerated all of BC Hydro's powers (including powers not generally available to private companies in British Columbia). The Act specifically provides that BC Hydro "is for all its purposes an agent of the government and its powers may be exercised only as an agent of the government." Hydro Act § 3(1) (Pet. App. 166a).

As a Provincial Crown Corporation, BC Hydro is owned in its entirety by Her Majesty the Queen in right of the Province of British Columbia, by which name the Province is formally known. Dividends from BC Hydro's operations are payable only to the Province. All substantive powers of BC Hydro are subject to, and can only be exercised with, the approval of the Lieutenant Governor in Council or the Minister responsible for BC Hydro. Since its creation, BC Hydro has implemented the Two River Policy by building dams, developing storage capacity, and operating hydroelectric generating facilities. *See* Pet. App. 50a.

In 1964, Canada designated BC Hydro as the Canadian entity responsible for administering the Treaty. The United States designated BPA and the Army Corps of Engineers collectively as the United States entity. That same year, Canada, the Province, and the United States agreed to a Protocol for the implementation of the Treaty that provided, in a separate document, that British Columbia would receive an upfront payment in place of return of the first 30 years of the Canadian Entitlement.

By 1984, BC Hydro completed construction of the Revelstoke Dam on the Columbia River, the last of the major facilities contemplated under the Two River Policy. Because the Province's storage capacity greatly exceeded the Province's own electricity needs, BC Hydro became an active seller of power in foreign commerce at the international border to U.S. entities, principally BPA. Such sales, as well as the trading of the Canadian Entitlement to BPA-generated power in exchange for an upfront cash payment, accorded with the British Columbia Government's aim under the Treaty of maximizing the hydroelectric production capacity of the Columbia and Peace Rivers.

In the late 1980s, the Provincial Government undertook an overhaul of legislation governing the energy sector in British Columbia. The Hon. Jack Davis, then Minister of Energy, Mines and Petroleum Resources, described the export of surplus power as a governmental function:

> An export agency, I think, is desirable. It will begin its life this summer as a subsidiary of B.C. Hydro, simply because Hydro has the personnel and the expertise to do that kind of work without adding unduly to personnel.
>
> In the longer term, I think that agency should not be seen as a child or a part of Hydro. It should deal with long-term export opportunities. The reason for creating an agency – a single marketing desk, if I can describe it that way – is merely to drive a good bargain in the U.S.A. and not have competing B.C.

> or Canadian projects vying with each other on the U.S. side of the line. We sell from strength, in other words.

C.A. ER (PWX) 0608.

In December 1988, BC Hydro – acting as agent of the Provincial Government under the Hydro Act – incorporated the British Columbia Power Exportation Corporation under the Company Act of British Columbia as a wholly owned subsidiary of BC Hydro to serve the vital role of marketing the Province's surplus electric power. *See* Pet. App. 53a. The company changed its name in 1991 to the British Columbia Power Exchange Corporation, and in 2000 to Powerex Corp. *See id.*

From its inception, Powerex performed functions prescribed by Provincial officials. It took delivery of the Province's electricity available for export at the British Columbia border and sold it in the U.S. and Alberta. In the early 1990s, the Province directed Powerex to explore means of creating a more efficient Provincial power market for the trading of electricity among utilities, independent power producers, industrial consumers, and other major electricity consumers. Powerex also participated with BC Hydro in direct negotiations with the Corps of Engineers and BPA to define the Canadian Entitlement because, early in those talks, the potential for resale of the Canadian Entitlement in the U.S. became a prominent aspect of the negotiations. Ultimately, in 1999, the Province and BC Hydro assigned their rights, title, and interest in the Canadian Entitlement to Powerex. An agreed-on share of the proceeds from Powerex's marketing of the Canadian Entitlement is passed directly to the Province. The remainder of Powerex's "profits" are then consolidated into BC Hydro's net income, which, in turn, is available for distribution through the Province's general revenues and/or to a "Rate Stabilization Account" for maintaining lower electricity rated for the Province's citizens.

In 1997, the Province enacted the Power for Jobs Development Act ("Jobs Act"), which directed that portions of BC Hydro's surplus electricity, including a Provincial Government-determined portion of the Canadian Entitlement otherwise for sale by Powerex externally, would be diverted to British Columbia industry to create jobs. *See* Jobs Act § 2 (Pet. App. 193a). The Jobs Act directed BC Hydro and Powerex to supply power to British Columbia businesses on terms defined by the Provincial Government. *See id.* § 3 (Pet. App. 193a).

In addition, Powerex was directed by the Province to perform treaty obligations incurred by the Province under the U.S.-Canadian Skagit River Treaty.[2] Under that agreement, the City of Seattle agreed not to raise the High Ross Dam, which would have had the effect of flooding substantial areas of British Columbia. In exchange, British Columbia agreed to deliver substantial quantities of electricity to Seattle through 2066. In the late 1990s, Powerex took the lead in negotiating transmission arrangements, pursuant to which BPA agreed to deliver to Seattle the power that Powerex obtained from BC Hydro. *See* Pet. App. 56a-57a. Powerex's treaty responsibilities increased from an assignment of certain BC Hydro rights and obligations under the Treaty to Powerex.

The uncontradicted evidence further showed that, pursuant to Provincial legislation and regulations, all of Powerex's earnings are consolidated with those of BC Hydro for purposes of establishing BC Hydro's electricity rates.[3] Under a formula set by Provincial laws and regulations, BC Hydro annually pays to the Province accumulated net

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[2] Treaty Between Canada and the United States of America Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D'Oreille River, Apr. 2, 1984, T.I.A.S. No. 11088, 1469 U.N.T.S. 309 (Pet. App. 138a-146a).

[3] Special Direction No. 8 to the British Columbia Utilities Commission, B.C. Reg. 71/98, amended by B.C. Regs. 72/98, 73/98, and 119,2000, §§ 3-5 (Pet. App. 206a-214a).

income from the combined operations of BC Hydro and Powerex.[4] Because it is entirely owned by BC Hydro, which is statutory agent of the Province, Powerex is also subject to the Financial Administration Act, pursuant to which the Province: issues regulations or directives regarding the planning, management, and reporting of capital expenditures by government bodies; creates a special account under Provincial control for insurance and risk management services; requires financial and accounting operations to be reported to the Provincial Comptroller General; and mandates that investments, loans, and debts be administered through the Province.[5] The Lieutenant Governor in Council appoints BC Hydro's board of directors, and these Provincially appointed board members also constitute a majority of Powerex's board of directors. Those same Provincially appointed board members then appoint Powerex's remaining outside directors, subject to Provincial approval. *See id.* at 58a-59a.

BC Hydro further acts as Powerex's treasurer, and BC Hydro's borrowings in turn are guaranteed by the Province. *See id.* at 59a. Unlike private corporations, Powerex is exempt from income taxes under the Canadian and Provincial tax laws.[6]

3. Once the case was removed to federal court, and given the enormous breadth of the plaintiffs' proposed class, all of the federal district court judges in California's three federal districts recused themselves from hearing this matter, necessitating the designation of the Honorable Robert H. Whaley of the United States District Court for the Eastern District of Washington to preside over the

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[4] Special Directive No. 4 to the British Columbia Hydro and Power Authority, O.1.c. 494/2000, §§ 5-8 (Pet. App. 203a-204a).

[5] Financial Administration Act, [R.S.B.C. 1996], ch. 138, §§ 1(b), 4.1, 8, 30, *at* http://www.qp.gov.bc.ca/statreg/stat/F/96138_01.htm.

[6] Constitution Act, 1867 (The British North America Act), 30 & 31 Vict., ch. 3 (U.K.), [R.S.C. 1985], App. II, No. 5, § 125 (Pet. App. 162a).

case.[7] Following petitioner's removal of the case to federal court, the plaintiffs moved to remand. BPA, WAPA, and BC Hydro all opposed remand based on their governmental status, and further moved to dismiss based on their sovereign immunity.

Powerex opposed remand on the ground that it was an instrumentality of a foreign sovereign. Powerex conceded that it did not enjoy immunity from suit under the FSIA (because its electricity sales in the United States constitute a "commercial activity" within the enumerated exceptions to sovereign immunity under the FSIA, *see* 28 U.S.C. § 1605(a)(2)). But Powerex maintained that, as a foreign sovereign, the FSIA's jurisdictional and procedural safeguards governed, which meant that the case against it could proceed only in a bench trial in federal court.

On December 13, 2002, the district court entered an order granting the motion to dismiss of BC Hydro, finding that it was immune from suit. *See* Pet. App. 8a.[8] The court further held that Powerex was not entitled to remove this case under the FSIA. While outlining some of the facts demonstrating Powerex's inseparable connection to the Province of British Columbia, the court nonetheless viewed Powerex as "closely analogous" to the corporation in *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), *aff'd in part*, 538 U.S. 468 (2003). From that analogy alone, the court held that Powerex was not an organ of the Province under § 1603(b)(2). *See* Pet. App. 34a-36a. The court held dispositive that Powerex does not possess "regulatory authority," is not immune from suit under Canadian law, and is not subject to daily governmental

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[7] The judges of the California Superior Court have not recused themselves or taken any similar action.

[8] The district court also held that it lacked jurisdiction over cross-claims against BPA and WAPA under the doctrine of derivative jurisdiction and 28 U.S.C. § 1441(e), finding that both entities were entitled to sovereign immunity. *See* Pet. App. 38a-44a. Rather than dismiss BPA and WAPA from the suit, however, the district court remanded the entire action to the state court. *See id.* at 44a.

oversight. *Id.* at 35a. The court deemed it unnecessary to address the other evidence of Powerex's sovereign status. *Id.* at 35a-36a. The court then rejected Powerex's contention that, as the wholly owned entity of the Province's statutory agent BC Hydro, BC Hydro's ownership of Powerex must be imputed to the Province under ordinary tenets of agency law. The court read Ninth Circuit precedent as holding that "a corporation owned by an instrumentality of a foreign government is not itself an instrumentality of that government." *Id.* at 36a. Accordingly, the court dismissed BC Hydro as a defendant and remanded the case as to BPA, WAPA, and Powerex.

4. Powerex timely appealed, and the Ninth Circuit affirmed the order of remand.[9] The court initially explained that the relevant inquiry under § 1603(b)(2) is whether the entity engages in a public activity on behalf of a foreign government. *See* Pet. App. 15a. The court acknowledged some record evidence that Powerex "serves a public purpose" on behalf of Provincial citizens. *Id.* at 16a. The court then announced a test that enabled it to disregard record evidence: "[Powerex's] high degree of independence from the government of British Columbia, combined with its lack of financial support from the government and its lack of special privileges or obligations under Canadian law[,] *dictate* our holding that PowerEx [*sic*] is not an organ of British Columbia." *Id.* (emphasis added). The Court did not address the substantial evidence demonstrating Powerex's activities serving the national interests of Canada and the Province – including the circumstances of Powerex's creation, the scope and nature of its activities on behalf of the Province, and employment policies requiring Provincial appointment and approval of Powerex's

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[9] BPA and WAPA also appealed the district court's remand of the cross-claims against both agencies. The court of appeals held that the cross-claims must be dismissed pursuant to § 1442(a) and thus vacated the portion of the district court's order remanding the remaining claims against those federal entities. *See* Pet. App. 16a-17a. BPA and WAPA have subsequently been dismissed from this action.

board members and outside directors – which Powerex submitted as key attributes of sovereign status.

As to the Province's ownership of Powerex, the court rejected petitioner's contention that the Province directly owned Powerex through BC Hydro as the Province's statutory agent. The court read this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), as foreclosing such an analysis because, "unless the foreign government itself actually owns the shares, the entity does not meet the definition of a foreign state." Pet. App. 16a (citing 538 U.S. at 474-76).

REASONS FOR GRANTING THE PETITION

1. The Ninth Circuit's ruling conflicts with the decisions of three other circuits on an issue of critical importance to the unhindered flow of cross-border and international commerce. Contrary to the legal presumptions created by the Ninth Circuit's wayward ruling, Powerex is no mere for-profit energy corporation. Rather, it is an "organ" of a foreign state because its creation, purposes, conduct, and operations all reflect the public policy judgments of British Columbia, as enacted by Provincial statute and administered by public officials. Treating Powerex as a commercial enterprise disregards the Province's governmental role in cross-border electricity trade and water management pursuant to treaties between Canada and the United States. Powerex's electricity sales, which the court of appeals seized upon as evidence of a private, not public, purpose, are used to generate "profits" back to the British Columbia government for direct remittance to the Province to stabilize the rates that citizens pay for electricity, to comply with Provincial statutes to subsidize British Columbia businesses, or to meet other Provincial budgetary needs. Powerex is subject to a host of unique burdens, including oversight by Provincial officials, while enjoying privileges such as financial support from the Province and immunity from Provincial and federal taxation that private entities do not share.

The court's mechanical approach to the interpretation of § 1603(b)(2) makes all of those facts legally irrelevant and, consequently, renders insignificant the core question of whether the entity "engages in activity serving a national interest and does so on behalf of its national government." *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 209 (3d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004). Because the result in this case would be different in the Second, Third, and Fifth Circuits, which reject a categorical approach in favor of a totality-of-the-circumstances inquiry, this Court should grant plenary review.

The practical consequences of the Ninth Circuit's decision are clear. Foreign governments will be exposed to the ad-hoc decision making of state courts within the Ninth Circuit's territorial reach for conduct that, in other circuits, remains appropriate for federal review under nationally uniform standards. If governmental entities are denied the jurisdictional and substantive protections of the FSIA because of the Ninth Circuit's restrictive, mechanistic test, there will be a chilling effect on future trade activity to the region's detriment. Such a result will also, inevitably, bring the United States into conflict with its cross-border partners over national obligations arising under NAFTA where, as here, judicial decisions produce favorable treatment for American entities at the expense of indistinguishable Canadian or Mexican agencies.

2. The Ninth Circuit's second holding also raises a question of great significance. The court misread the rule established by this Court in *Dole Food* that Congress intended the requirement of an "ownership interest" in § 1603(b)(2) of the FSIA to be governed by the common law standards applicable to private corporations. Notwithstanding this Court's guidance, the Ninth Circuit held that the FSIA absolutely precludes the application of common law principles of agency to entities owned by foreign governments through statutory agents in determining whether an entity is "owned" by the foreign government. That holding ignores the common law of corporate

agency under which BC Hydro's ownership of Powerex is imputed to its principal, the Province of British Columbia. The Ninth Circuit's decision thus confuses "ownership" with "control" and inverts this Court's holding to mean that "as a categorical matter" all agents are deemed distinct from their principals. *Dole Food*, 538 U.S. at 475-76.

Taken together, the Ninth Circuit's holdings simultaneously create great uncertainty as to the range of foreign entities protected by the FSIA (through its ad-hoc analysis of governmental organs) and establish an artificial test for ownership that ignores this Court's instructions in *Dole Food*. Given the tremendous volume of cross-border and international commerce implicated by the Ninth Circuit's ruling, the tensions over the treatment of governmental instrumentalities by courts in the United States is certain to increase. The need to correct the Ninth Circuit's erroneous interpretation of two separate FSIA provisions and to resolve a direct circuit conflict on an issue with significant international implications thus warrants this Court's review.

I. THE NINTH CIRCUIT CREATED A MULTI-CIRCUIT CONFLICT ON WHAT CONSTITUTES AN "ORGAN" OF A FOREIGN STATE UNDER THE FSIA

A. The Ninth Circuit's New Standard Eliminates The Fact-Specific Analysis Congress Intended For Determining Whether An Entity Of A Foreign Sovereign Is An Organ Of The State

1. The Ninth Circuit fundamentally misunderstood that Congress intended for courts to examine foreign entities claiming "organ" status under the FSIA by employing a fact-sensitive inquiry that considers a range of characteristics. As a general matter, the FSIA defines a "foreign state" broadly to include both the sovereign nation itself, and any "agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a); *see Gates v. Victor Fine Foods*, 54 F.3d 1457, 1460 (9th Cir. 1995) (concluding that Congress "intended the terms 'organ' and 'agency or instrumentality'

to be read broadly"). Section 1603(b) defines an agency or instrumentality to include any entity that (1) "is a separate legal person, corporate or otherwise," and is (2) "an organ of a foreign state" or "a majority of whose shares or other ownership interest is owned by a foreign state," and (3) "is neither a citizen of a State of the United States" nor "created under the laws of any third country." 28 U.S.C. § 1603(b)(1)-(3). There is no dispute that Powerex is a separate legal entity and is not a citizen of either the United States or some third country. *See* Pet. App. 14a. The only issue, therefore, is whether Powerex satisfies the definition of an "organ" under § 1603(b)(2).

Congress did not define the meaning of the term "organ." Nonetheless, commentators have consistently recognized that the fact-sensitive organ test is necessary to address entities that "might not have ownership interests familiar to American judges or lawyers, but that have close connections with the state." Joseph W. Dellapenna, *Refining the Foreign Sovereign Immunities Act*, 9 Willamette J. Int'l L. & Disp. Resol. 57, 81 (2001); *see also* Report of the Working Group of the American Bar Association, *Reforming the Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489, 516 (2002); Joseph W. Hardy, Jr., Note, *Wipe Away the Tiers: Determining Agency or Instrumentality Status Under the Foreign Sovereign Immunities Act*, 31 Ga. L. Rev. 1121, 1161 (1997). Nor is Congress's silence on the definition of a foreign "organ" unusual in the context of the FSIA. Section 1603(d) defines a "commercial activity" only by "reference to the nature of the course of conduct." As the FSIA legislative history explains, this vague standard reflects the view that "[i]t has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable." H.R. Rep. No. 94-1487, at 16 (1976), 1976 U.S.C.C.A.N. 6604, 6615. Instead, Congress decided to grant the courts "a great deal of latitude in determining what is a 'commercial activity.'" *Id.* The omission of a precise definition of the term "organ" is thus similarly

indicative of Congress's intent to provide the courts with a broad and flexible standard for evaluating whether an entity is a foreign sovereign's "organ." *See Gates*, 54 F.3d at 1460 (concluding that Congress "intended the terms 'organ' and 'agency or instrumentality' to be read broadly").

2. The Ninth Circuit's decision in this case, which builds on its prior decision in *Dole Food*, honors none of these principles and instead embraces a mechanical and inflexible approach to organ status under the FSIA.[10] In this case, the Ninth Circuit determined organ status using none of the flexible and fact-specific analysis envisioned by Congress that would address the creation, composition, and daily functions of the entity. Instead, the Ninth Circuit below engaged in a rigid (and circumscribed) analysis of four factors: (1) the purpose of the entity's activities; (2) the entity's independence from the government; (3) the level of financial support from the government; and (4) the entity's immunity from suit. *See* Pet. App. 15a. That test disregards any consideration of critical characteristics such as the circumstances surrounding the entity's creation, employment requirements, or structures imposed by the foreign governments that other circuits have specifically held are crucial attributes of an organ's sovereign status. *See* pp. 19-20, *infra*.

Moreover, the characteristics selected by the Ninth Circuit as dispositive are contrary to both the FSIA's text and logic. First, the "degree of independence" inquiry is

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[10] Although this Court affirmed the Ninth Circuit's decision in *Dole Food*, its review was limited to the meaning of "ownership" in § 1603(b)(2), which extends agency or instrumentality status to an entity "a majority of whose shares or other ownership interest is owned by a foreign state." 28 U.S.C. § 1603(b)(2); *see Dole Food*, 538 U.S. at 471 (explaining question presented as whether "a corporate subsidiary can claim instrumentality status where the foreign state does not own a majority of shares but does own a majority of the shares of a corporate parent one or more tiers above the subsidiary"). In addition, this Court held that instrumentality status under § 1603(b) must be determined at the time the suit is filed. 538 U.S. at 478. This Court did not review the Ninth Circuit's analysis of organ status under the FSIA.

contrary to § 1603(a), which expressly states that the term "foreign state" "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). Section 1603(b) defines an agency or instrumentality to include any entity that (1) "is a separate legal person, corporate or otherwise," and (2) "is an organ of a foreign state or political subdivision" of a foreign state, and (3) "is neither a citizen of a State of the United States" nor "created under the laws of any third country." *Id.* § 1603(b)(1)-(3). The Ninth Circuit held that Powerex's "high degree of independence" from the Province denied it organ status, Pet. App. 16a, but, to be an agency or instrumentality at all, the entity must be "a separate legal person, corporate or otherwise." 28 U.S.C. § 1603(b)(1). The Ninth Circuit's new approach thus functionally nullifies a statutory prerequisite for a sovereign "agency or instrumentality" because it posits that an independent entity *cannot* be the sovereign's "organ." *Cf. EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 640 (9th Cir.) (concluding that organ status remains appropriate even where the entity "has some autonomy from the foreign government"), *cert. denied*, 540 U.S. 1003 (2003); *EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co.*, 257 F.3d 992, 997 (9th Cir. 2001) (explaining that organ status is not defeated "even though the government was not involved in the day-to-day activities" of the entity); *see also Gates*, 54 F.3d at 1461 ("that the Province is not directly involved in the day-to-day activities of [an agency] does not mean that it is not exercising control over the entity").

Second, the Ninth Circuit's "lack of financial support from the government" prong (Pet. App. 16a) finds no support in the text of the FSIA or in logic.[11] The text, in fact,

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[11] Worse still, the Ninth Circuit's application of its erroneous legal standard is not even supported by the record facts. Powerex does enjoy financial support from the Province, relying on the Province's credit rating to support its trades in the electricity market and financial guarantees issued by BC Hydro in support of Powerex's export trade.

rebuts the Ninth Circuit's suggestion because a foreign sovereign can still retain its sovereign status when it engages in "commercial activity" even though it will not be completely immune from suit. 28 U.S.C. § 1605(a)(2). On that basis, numerous courts have held that a foreign sovereign entity engaging in commercial activity – such as Powerex – is still entitled to remove a suit from state court and to litigate in federal court under procedural protections afforded by the FSIA. *See, e.g., USX*, 345 F.3d at 209; *EIE Guam*, 322 F.3d at 635. That is because, notwithstanding an absence of substantive immunity, "[t]he FSIA is the exclusive source of subject matter jurisdiction over suits involving foreign states and their instrumentalities." *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 654 (9th Cir. 1996). Certainly nothing in the text suggests that Congress intended to distinguish between sovereigns engaging in commercial activity that need to be subsidized by the government and those that do not. And such a notion is flatly inconsistent with the United States government's practice, which operates instrumentalities such as BPA to generate low-cost electricity for consumers and affords those instrumentalities complete immunity from suit.[12]

Finally, the Ninth Circuit's fourth categorical factor – whether the foreign entity received "special privileges or obligations" under the foreign sovereign's law – was defined by the court below as solely whether the foreign entity was immune from suit under foreign law. Pet. App. 16a. That factor, however, ignores that a foreign sovereign can imbue its organs with numerous "privileges or obligations" without necessarily conferring full immunity

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[12] The Ninth Circuit's emphasis on substantive immunity is particularly improper here as Powerex acknowledged that its electricity sales in the United States constitute a "commercial activity" within the enumerated exceptions to sovereign immunity under § 1605(a)(2) of the FSIA. That exception has no relevance to Powerex's entitlement as a foreign sovereign to jurisdictional and procedural safeguards of the FSIA.

from suit. In Powerex's case, those "privileges or obligations" include exemption from Provincial and federal taxation,[13] a remittance of income to BC Hydro's consolidated financial statement or directly to the Province, and a mandate that the organ perform treaty functions and governmental purposes not required of private entities. As a litmus test, the one chosen by the Ninth Circuit below is especially odd and regressive. Strikingly, such a test ignores that Congress, in requiring an organ of a foreign state to be a "separate legal person," specifically intended the term to encompass "a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, *can sue or be sued in its own name*, contract in its own name or hold property in its own name." H.R. Rep. No. 94-1487, at 15, 1976 U.S.C.C.A.N. at 6614 (emphasis added). Instead, the Ninth Circuit's test would impose on foreign sovereigns a duty under their own law to make their organ immune from suit solely so they could litigate in a United States federal court *without* substantive immunity under the commercial activities exception. Nothing in the text or purposes of the FSIA compels such a strange result.

B. The Ninth Circuit's Decision Conflicts With Three Circuits On Whether A Commercial Entity Performing Government Functions Is An Organ Of A Foreign State

1. The Ninth Circuit below established a standard for determining organ status under the FSIA that departs from the existing majority test and creates a significant split of authority among four federal circuits. Consequently, foreign governments now lack a "predictable, uniform jurisdictional scheme" under the FSIA. *See* Della-

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[13] *See, e.g., Bolden v. Southeastern Pennsylvania Transp. Auth.*, 953 F.2d 807, 820 (3d Cir. 1991) (en banc) (discussing "attributes associated with sovereignty" including exemption from taxation); *Gorenc v. Salt River Project Agric. Improvement & Power Dist.*, 869 F.2d 503, 507 (9th Cir. 1989) (explaining that "immun[ity] from taxation on the sale of electricity" is an "attribute[] of . . . sovereign[ty]").

penna, *supra*, 9 Willamette J. Int'l L. & Disp. Resol. at 92. That result is entirely inconsistent with Congress's intent in passing the FSIA to confer "broad jurisdiction in the Federal courts" to ensure "uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." H.R. Rep. No. 94-1487, at 13, 1976 U.S.C.C.A.N. at 6611.

Applying these principles, a majority of circuit courts has rejected the rigid analysis adopted by the Ninth Circuit in this case and concluded that "an entity that engages in activity serving a national interest and does so on behalf of its national government qualifies for the protections of the FSIA, including a federal forum." *USX*, 345 F.3d at 209. In making that assessment, those courts examine six separate and independent factors: (1) the "circumstances surrounding the entity's creation"; (2) the "purpose of its activities"; (3) the entity's "independence from the government"; (4) the "level of government financial support"; (5) the entity's "employment policies"; and (6) the entity's "obligations and privileges under the foreign state's law." *Id.* at 206, 209; *see also Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir.), *cert. denied*, 125 S. Ct. 677 (2004); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-47 (5th Cir. 2000). A host of district courts has likewise followed the majority's multi-factor approach.[14] Mindful, however, that Congress intended to accord foreign entities "immunity not only from liability,

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[14] *See, e.g., In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 790-91 (S.D.N.Y. 2005); *RSM Prod. Corp. v. Petroleos de Venezuela Societa Anonima*, 338 F. Supp. 2d 1208, 1215 (D. Colo. 2004); *Shirobokova v. CSA Czech Airlines, Inc.*, 335 F. Supp. 2d 989, 991 (D. Minn. 2004); *Filler v. Hanvit Bank*, 247 F. Supp. 2d 425, 428 (S.D.N.Y. 2003), *vacated in part on other grounds*, Nos. 01 Civ. 9510 *et al.*, 2003 WL 21729978 (S.D.N.Y. July 25, 2003), *aff'd*, 378 F.3d 213 (2d Cir.), *cert. denied*, 125 S. Ct. 677 (2004); *United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, No. 97 Civ. 6124, 1999 WL 307666, at *5 (S.D.N.Y. May 17, 1999), *aff'd*, 199 F.3d 94 (2d Cir. 1999); *Supra Med. Corp. v. McGonigle*, 955 F. Supp. 374, 378-79 (E.D. Pa. 1997).

but from the burdens of litigation as well," these courts will "*not* apply them mechanically or require that all . . . support an organ-determination." *Kelly*, 213 F.3d at 847; *see also USX*, 345 F.3d at 207, 209 (noting "congressional goals of promoting uniformity of decision and avoiding impairing foreign relations," and concluding that "no one [factor] is determinative").

2. The Ninth Circuit initially appeared to have adopted a standard comparable to that of the other circuits. *See Gates*, 54 F.3d at 1460-61 (concluding that the Alberta Pork Producers Development Corporation, a Canadian entity established pursuant to the Alberta Marketing of Agricultural Products Act, constituted an organ of the Province because it was established pursuant to Provincial statute and served Provincial public policy purposes); *Corporacion Mexicana*, 89 F.3d at 655 (holding that Pemex Refining qualified as an organ of the Mexican government because it was "created by the Mexican Constitution, Federal Organic Law, and Presidential Proclamation" and granted "exclusive responsibility of refining and distributing Mexican government property").

In *Dole Food*, however, the Ninth Circuit adopted a new test that contrasted with Congress's expectation that the FSIA would govern jurisdiction over suits brought against the organs of foreign states engaged in commercial activities. The court considered the organ status of entities "created by Israel for the purpose of exploiting the Dead Sea resources owned by the government" and "classified as 'government companies' under Israeli law." 251 F.3d at 808. In addition, the government "had the right to approve the appointment of directors and officers, as well as any changes in the capital structure" of the entities, and the power to "constrain" the entities' use of profits as well as the salaries of the directors and officers. *Id.*

Although acknowledging these facts, and characterizing the question as "close," the court ultimately concluded that the entities did not qualify as instrumentalities under the FSIA. The court based its conclusion on the ab-

sence of any "regulatory authority" by the entities and the entities' employment of private rather than civil servants. *Id.* The court did not explain what, if any, significance it attributed to the circumstances surrounding Israel's creation of the entities or the concededly public purpose of exploiting governmental resources. *Dole Food* thus shifted away from the sound approach of the Second, Third, and Fifth Circuits by de-emphasizing certain attributes of sovereignty while elevating the importance of commercial activities in denying the protections of the FSIA.

3. The court's decision in this case now confirms that the Ninth Circuit has indeed rejected the contextual approach advanced by other circuits, thereby creating a clear split of authority on the meaning of a key provision in the FSIA. The Ninth Circuit's new approach ignores two basic factors relied on by the other circuits to determine an entity's organ status. First, the Ninth Circuit no longer considers the circumstances surrounding the creation of a governmental entity. It is illogical, however, to attempt to determine whether an entity serves a sovereign purpose on behalf of a foreign government without any consideration of the circumstances that led to its creation. *See USX*, 345 F.3d at 210. Second, the Ninth Circuit gives no weight to the employment policies and responsibilities of the entity. Yet employment policies are a common means of imposing governmental oversight and furthering the public mission of a governmental agency.

The test applied by the court below renders both of those factors irrelevant or insufficient. There is simply no reading of the Ninth Circuit's decision, therefore, that will reconcile the court's new "categorical" approach to an entity's sovereign status with the decisions of the other circuits where no one factor is deemed "determinative." *USX*, 345 F.3d at 209; *Kelly*, 213 F.3d at 847.

4. Had the Ninth Circuit below applied the totality-of-the-circumstances approach to organ status accepted in the Second, Third, and Fifth Circuits, which includes assessment of the circumstances surrounding Powerex's

creation and the employment policies imposed by the Province of British Columbia, the court would have readily concluded that Powerex qualified as an "organ" of British Columbia.[15]

First, the circumstances surrounding Powerex's creation establish a sovereign purpose and thus "weigh more heavily in favor of organ status." *USX*, 345 F.3d at 210. Powerex was created by a directive of the Province's Minister of Energy to act as the Province's exclusive export agency for marketing the Province's governmentally owned and generated surplus hydropower capacity in a manner that maximized benefits to British Columbia and its citizens. *See Corporacion Mexicana*, 89 F.3d at 655 (Pemex Refining qualified as an organ of the Mexican government because it was "created by the Mexican Constitution, Federal Organic Law, and Presidential Proclamation" and granted "exclusive responsibility of refining and distributing Mexican government property").

To fulfill these goals, Powerex was created as a wholly owned subsidiary of a Canadian Crown Corporation of the Province that is the Province's agent by statute. Powerex was also assigned Provincial treaty rights and obligations under the Columbia River Treaty and the Skagit River Treaty, and now carries out treaty obligations concerning natural resources within the Province's exclusive control. Powerex is inseparable from the Province in critical respects (including use of the Province's credit rating) and is directly controlled by the Provincial Government through its role in appointing and approving the members of Powerex's board. Finally, Powerex's revenue does not result in private "profits," but is instead consolidated with those

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[15] This Court has explained that, while "[i]t is not customary for this Court to review the sufficiency of the evidence, . . . we will do so when the issue is properly before us and the benefits of providing guidance concerning the proper application of a legal standard and avoiding the systemic costs associated with further proceedings justify the required expenditure of judicial resources." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993) (collecting cases).

of its parent, BC Hydro, and made available for distribution for public purposes through the Province's consolidated general revenues (or, in the case of a portion of the proceeds from sale of the Canadian Entitlement, made available directly to the Province).

By ignoring these circumstances surrounding Powerex's creation, the Ninth Circuit failed to consider the "national purpose" that Powerex serves in developing the water resources of British Columbia and in performing treaty obligations for Canada. *See Kelly*, 213 F.3d at 848 (concluding entity was created for a national purpose "because it was formed by government decree to develop and explore Syria's mineral resources, control over which is a basic aspect of sovereignty").

Second, the employment policies imposed on Powerex by the Province indicate the public nature of Powerex's functions. Although not considered by the Ninth Circuit, Powerex is controlled by governmental appointees. The Lieutenant Governor in Council (the Executive Council of the Province) directly appoints BC Hydro's board of directors, which, in turn, appoints the Powerex board. *See* Pet. App. 58a-59a. A subset of the Provincially appointed BC Hydro board constitutes the majority of the seven seats on Powerex's board, and the remaining outside directors must be confirmed by the Premier's office. *See id.* at 59a. The Province also retains authority to approve the appointment of Powerex's outside directors. *See id.*.

Moreover, while the Province does not directly pay the salaries of Powerex employees, Powerex is forced to comply with Provincial guidelines for public employee compensation. *See* C.A. ER (PWX) 788 (Peterson Dep.). These guidelines constrain Powerex from paying rates to its employees that are paid by private energy companies. The Province also guarantees the pension benefits of Powerex's employees. *See id.* at 797; *cf. USX*, 345 F.3d at 213 (participation in private rather than public pension plan does not support organ status).

All of these facts, together with factors such as Powerex's exemption from Provincial or federal taxation and its access to BC Hydro financial support for export trade transactions, confirm that, under the plain meaning of the term "organ" in § 1603(b)(2) that is uniformly applied by the Second, Third, and Fifth Circuits, the Ninth Circuit should have reversed the district court's ruling that the case was not properly removed.[16]

C. Uniform Application Of The FSIA's Protections Is Of Surpassing Importance To Foreign Governments Conducting Business In The United States

The volume of commerce that will be affected by the Ninth Circuit's ruling is staggering. From 2000 through 2004, a mere three Canadian crown corporations – Hydro-Quebec, New Brunswick Power Corp., and Manitoba Hydro-Electric Board – exported more than $13.8 billion Canadian of energy products into the United States, and Powerex itself exported $10.9 billion Canadian.[17] In 2001-

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[16] In addition to its misunderstanding of the facts and law of the factors on which it *did* rely, the Ninth Circuit erred in perceiving the Dead Sea Companies in *Dole Food* as the most analogous entities. The Dead Sea Companies in *Dole Food* were not wholly owned by the government, did not perform treaty functions, and did not return profits to the government. Rather, the proper analogy should have been to *EIE Guam*, 322 F.3d at 640-41. There, as here, the government had created the corporation "to perform a public function" and "'to carry out [the foreign government's] national policy.'" *Id.* at 640. The government had also vested exclusive authority in and provided funding for the corporation "'to perform such activities.'" *Id.* In all of those respects, Powerex is like the government corporation in *EIE Guam*, which was permitted to remove a case filed in Guam territorial court and to litigate instead in federal court. *See id.* at 637.

[17] *See* Hydro-Quebec, *Annual Report 2004*, at 107 (Mar. 31, 2005); Hydro-Quebec, *Annual Report 2002*, at 97 (Mar. 31, 2003); Hydro-Quebec, *Annual Report 2001*, at 91 (Mar. 31, 2002); BC Hydro, *2005 Annual Report* at 109 (June 29, 2005); BC Hydro, *2004 Annual Report* at 124 (June 14, 2004); BC Hydro, *2003 Annual Report* at 127 (July 21, 2003); BC Hydro, *2001 Annual Report* at 67 (July 11, 2002); New Brunswick Power Corp., *2003/04 Annual Report* at 47 (June 30, 2004);

2003, Canada's energy exports to Ninth Circuit states totaled more than $20.9 billion.[18]

When, inevitably, disputes regarding this cross-border commerce arise within the Ninth Circuit's territorial reach, entities sharing the characteristics of Powerex will be subject to major uncertainties about their procedural and substantive rights under the FSIA. Should the Ninth Circuit's new interpretation of § 1603(b)(2) stand, corporations created by foreign governments will face not only the prospect of being confined to state court – no mere idle concern given that California's federal district judges have recused themselves in cases arising out of the California energy crisis of 2000-2001 but California's state judges have not – but also a loss of the very sovereign immunity codified in the FSIA. In stark contrast, foreign entities operating within the Second, Third, and Fifth Circuits will continue to benefit from the multi-factor, fact-sensitive approach to determining organ status. As a result, plaintiffs seeking to sue foreign sovereign corporations will have every incentive to engage in forum shopping by suing in state court in Ninth Circuit states, a phenomenon that portends a chilling effect on future cross-border and international trade, or, even worse, may spark international trade disputes.

New Brunswick Power Corp., *2002/03 Annual Report* at 44 (June 30, 2003); New Brunswick Power Corp., *2001/02 Annual Report* (June 28, 2002); New Brunswick Power Corp., *2000/01 Annual Report* at 45 (June 28, 2001); Manitoba Hydro-Electric Board, *53rd Annual Report* at 87 (Aug. 11, 2004); Manitoba Hydro-Electric Board, *51st Annual Report* at 51 (July 29, 2002); Manitoba Hydro-Electric Board, *49th Annual Report, summary available at* http://www.hydro.mb.ca.

[18] Canadian Embassy, *State Trade Fact Sheets 2004, available at* http://www.canadianembassy.org; Canadian Embassy, *State Trade Fact Sheets 2003, available at* http://www.dfait-maeci.gc.ca; Canadian Embassy, *State Trade Fact Sheets 2002, available at* http://www.dfait-maeci.gc.ca.

D. The Ninth Circuit's Decision Creates Significant Tensions With The United States' Obligations Under The North American Free Trade Agreement

Resolution of the circuit conflict created by the Ninth Circuit's decision is critically important to avoid disrupting the growth of cross-border trade in North America under NAFTA.[19] NAFTA Article 1102(1) makes clear that the U.S. must guarantee Powerex "treatment no less favorable than it accords, in like circumstances," to domestic investors. NAFTA art. 1102(1), 32 I.L.M. at 639 (Pet. App. 147a). This "broad requirement" establishes that there "shall be no discrimination by a Party as between domestic and foreign investors." Daniel Q. Posin, *The Multi-Faceted Investment Arbitration Rules of NAFTA*, 13 World Arb. & Mediation Rep. 13, 13-14 (2002). By treating other comparable and functionally similar U.S. wholesale power suppliers such as BPA and WAPA as sovereign entities while denying Powerex's status as a foreign sovereign – even though BPA and Powerex alike perform governmental duties under the Columbia River Treaty – the decision below gives an unfair national benefit to a U.S. entity in discrimination against a Canadian entity.

Such treatment violates NAFTA standards and unnecessarily entangles the courts in matters of foreign economic policy entrusted to the Executive Branch. *See* Todd Weiler, *The Treatment of SPS Measures Under NAFTA Chapter 11: Preliminary Answers to an Open-Ended Question*, 26 B.C. Int'l & Comp. L. Rev. 229, 241 (2003) (the goal of the non-discrimination clause "is to provide the foreign firm with the promise of an effective equality of competitive opportunities between it and its competitors"). Moreover, by applying a different standard for

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[19] North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, done Dec. 17, 1992, 32 I.L.M. 289.

organ immunity to Powerex than previously applied to foreign investments by a Mexican entity (in *Corporacion Mexicana*), the Ninth Circuit's decision below fails to "accord to investors of [the Province] treatment no less favorable than that it accords, in like circumstances, to investors of any other" NAFTA member nation. NAFTA art. 1103(1), 32 I.L.M. at 639 (Pet. App. 148a). The Court should thus grant certiorari to correct the Ninth Circuit's erroneous view of the FSIA and the resulting tension with the principle of non-discrimination underlying NAFTA.

II. THE NINTH CIRCUIT'S "OWNERSHIP" HOLDING CONFLICTS WITH *DOLE FOOD*

Even if it was proper to depart from the multi-factor test used by the other circuits to determine organ status, the Ninth Circuit committed a second error that directly conflicts with this Court's guidance on an issue of great significance: the court rejected Powerex's argument that common law principles of agency remain applicable to entities owned by foreign governments through statutory agents in determining whether an entity is "owned" by the foreign government. By holding that such principles do not apply, the Ninth Circuit has adopted a legal test for ownership that conflicts with this Court's precedent on an issue with substantial ramifications for corporate agencies of all foreign governments.

Section 1603(b)(2) defines an agency or instrumentality of a foreign state to include both organs of the foreign state and entities "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." In *Dole Food*, this Court held that courts must construe § 1603(b)(2) using the "basic tenet[s]" of American corporate law. 538 U.S. at 474. The Court explained that, in drafting § 1603(b)(2), Congress "was aware of settled principles of corporate law and legislated within that context." *Id.*; *see also* H.R. Rep. No. 94-1487, at 15, 1976 U.S.C.C.A.N. at 6614.

Consistent with *Dole Food*, Powerex argued that BC Hydro's sole ownership interest in Powerex – held on

behalf of the Province as its statutory agent – was sufficient to satisfy § 1603(b)(2). It is undisputed that under Provincial statutory law BC Hydro "is for all its purposes an agent of the government and its powers may be exercised *only* as an agent of the government." Hydro Act § 3(1) (Pet. App. 165a) (emphasis added). As the British Columbia Court of Appeals has recognized, "[s]ince its establishment BC Hydro has been an agent of the Crown in right of the Province." *Westbank First Nation v. British Columbia Hydro & Power Auth.*, [1997] 154 D.L.R. (4th) 93, *aff'd*, [1999] 4 C.N.L.R. 277. As such, all of the property owned by BC Hydro has been authoritatively adjudicated by Canadian courts to be owned by the Province. *See id.* at 98 (holding that property of BC Hydro is held as "the interest of the Crown in right of British Columbia and immune from taxation"). There is no logical basis for treating BC Hydro's 100% share interest in Powerex any differently from the other property BC Hydro owns on behalf of the Province.

As the Province's *agent*, BC Hydro had power to bind the Province as principal, as well as the authority to act at the Province's direction. *See Restatement (Second) of Agency* § 7 (1958) ("Authority is the power of the agent to affect the legal relations of the principal"). BC Hydro's ownership of Powerex's shares thus is legally imputed to the Province. *See id.* §§ 1, 7-8 (agent acts for the principal when performing with actual or apparent authority); *see also In re Focus Media Inc.*, 387 F.3d 1077, 1082 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 1674 (2005); *Mutual Life Ins. Co. v. Mooreman*, 366 F.2d 686, 689 (9th Cir. 1966).

The Ninth Circuit failed directly to address this argument and instead flatly concluded that, under *Dole Food*, "unless the foreign government itself actually owns the shares, the entity does not meet the definition of a foreign state." Pet. App. 16a. The court thus interpreted *Dole Food* as a firm rule that ownership by a foreign government through an agent created by statute is always insufficient to create sovereign status under § 1603(b)(2).

The Ninth Circuit's holding, however, failed to recognize that *Dole Food* addressed an entirely different question: whether § 1603(b)(2) created a *categorical* exception to the customary rule of corporate law that a corporate parent owning shares of a subsidiary does not have legal title to the assets of the subsidiary *for that reason alone*. *See* 538 U.S. at 474. This Court's decision in *Dole Food* begins by explaining the "basic tenet of American corporate law . . . that the corporation and its shareholders are distinct entities." *Id.* Under that rule, "[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary." *Id.* at 475. The Court then noted that this "tiered" corporate structure (where a parent controls a subsidiary through an intermediate entity) is not an absolute bar to derivative ownership, and that "[t]he veil separating corporations and their shareholders may be pierced in some circumstances." *Id.* Reviewing the history of the FSIA, however, this Court found "no authority" to interpret the FSIA "as piercing the veil in all cases," and nothing to indicate that "Congress intended us to depart from the general rules regarding corporate formalities." *Id.* at 475-76. *Dole Food* thus preserves the common law rule that the interests of two otherwise distinct corporations could be deemed a single enterprise for equitable purposes "on a case-by-case basis." *Id.* at 475.

Contrary to the Ninth Circuit's assumption below, the type of tiered ownership question at issue in *Dole Food* is simply not present here, where a statutory agent of the sovereign is created and its acts of corporate ownership are imputed to its principal, the foreign government, by operation of statute. Powerex invoked the "case-by-case" exception preserved by this Court and argued that BC Hydro, as the statutory agent of the Province, necessarily held all of the shares in Powerex on behalf of its principal, the Province. The court, however, misinterpreted Powerex's argument as claiming that tiered ownership through BC Hydro was alone sufficient (the argument rejected in

Dole Food). As the record makes clear, Powerex argued only that the agency relationship between BC Hydro and the Province was an exceptional circumstance that did not implicate the standard rule of separateness under corporate law. In failing to address that argument, the Ninth Circuit imposed a standard that is illogical and contrary to this Court's interpretation of congressional intent in drafting § 1603(b)(2).

The consequences of that error are severe. The Ninth Circuit's decision sweeps all forms of beneficial ownership into *Dole Food*'s scope and disavows any role for common law principles that affect corporations in the analysis of governmental ownership under the FSIA. A rule that forecloses beneficial ownership under the FSIA strips governments of the flexibility that Congress legislated as essential to the dynamic and evolving needs of international trade and foreign relations. That result impermissibly alters this Court's precedent and should be rejected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 15, 2005

Counsel for Powerex Corp.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

POWEREX CORP.,
Petitioner,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-57200
(D.C. No. CV-02-01001-RHW)

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.,
Plaintiffs,

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Intervenor,

v.

NRG ENERGY INC., ET AL.,
Defendants,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Cross-claimants-Appellants,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-defendants-Appellees.

No. 02-57202
(D.C. No. CV-02-00990-RHW)

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.,
Plaintiffs-Appellees,

v.

NRG ENERGY, INC., ET AL.,
Defendants,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Cross-claimants-Appellants,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-defendants,

AND

BONNEVILLE POWER ADMINISTRATION, ET AL.,
Cross-defendants-Appellees.

No. 02-57210
(D.C. No. CV-02-01000-RHW)

NRG ENERGY, INC., ET AL.,
Defendants,

AND

RELIANT ENERGY SERVICES, INC., ET AL.,
Defendants-Appellants,

v.

DUKE ENERGY TRADING AND MARKETING, LLC, ET AL.,
Cross-claimants,

v.

ARIZONA PUBLIC SVC, ET AL.,
Cross-defendants-Appellees.

No. 03-55118
(D.C. No. CV-02-01000-RHW)

NRG ENERGY, INC., ET AL.,
Defendants,

v.

DUKE ENERGY TRADING AND MARKETING, LLC, ET AL.,
Cross-claimants-Appellees,

v.

ARIZONA PUBLIC SVC, ET AL.,
Cross-defendants,

AND

POWEREX CORP.,
Cross-defendant-Appellant.

No. 03-55131
(D.C. No. CV-02-00990-RHW)

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.,
Plaintiffs,

v.

NRG ENERGY, INC., ET AL.,
Defendants,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Cross-claimants-Appellees,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-defendants,

AND

POWEREX CORP.,
Cross-defendant-Appellant.

No. 03-55176
(D.C. No. CV-02-01001-RHW)

NRG ENERGY, INC., ET AL.,
Defendants-Appellees,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Cross-claimants-Appellees,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-defendants,

AND

POWEREX CORP.,
Cross-defendant-Appellant.

No. 03-55241
(D.C. No. CV-02-01000-RHW)

NRG ENERGY, INC., ET AL.,
Defendants,

v.

DUKE ENERGY TRADING AND MARKETING, LLC, ET AL.,
Cross-claimants-Appellants,

v.

ARIZONA PUBLIC SVC, ET AL.,
Cross-defendants-Appellees.

No. 03-55249
(D.C. No. CV-02-01001-RHW)

NRG ENERGY, INC., ET AL.,
Defendants,

AND

DUKE ENERGY TRADING AND MARKETING, LLC, ET AL.,
Defendants -Appellants,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Cross-claimants,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-defendants-Appellees.

No. 03-55266
(D.C. No. CV-02-00990-RHW)

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.,
Plaintiffs-Appellees,

v.

NRG ENERGY, INC., ET AL.,
Defendants,

AND

DUKE ENERGY TRADING AND MARKETING, LLC, ET AL.,
Defendants-Appellants,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Cross-claimants,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-defendants.

No. 03-55319
(D.C. No. CV-02-01000-RHW)

NRG ENERGY, INC., ET AL.,
Defendants,

v.

DUKE ENERGY TRADING AND MARKETING, LLC, ET AL.,
Cross-claimants-Appellees,

v.

ARIZONA PUBLIC SVC, ET AL.,
Cross-defendants,

AND

BONNEVILLE POWER ADMINISTRATION, ET AL.,
Cross-defendants-Appellants.

No. 03-55322
(D.C. No. CV-02-01001-RHW)

NRG ENERGY, INC., ET AL.,
Defendants,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Cross-claimants-Appellees,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-defendants,

AND

BONNEVILLE POWER ADMINISTRATION, ET AL.

No. 03-55349
(D.C. No. CV-02-00990-RHW)

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.,
Plaintiffs- Appellees,

v.

NRG ENERGY INC., ET AL.,
Defendants,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Cross-claimants-Appellees,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-defendants

AND

BONNEVILLE POWER ADMINISTRATION, ET AL.,
Cross-defendants-Appellants.

Appeal from the United States District Court
for the Southern District of California,
Robert H. Whaley, U.S. District Judge, Presiding

[Argued June 14, 2004]

[Decided Dec. 8, 2004]

Before: SCHROEDER, Chief Judge, CANBY, and TALLMAN, Circuit Judges.

SCHROEDER, Chief Judge:

The fundamental question in this appeal from a district court order of remand is whether we have appellate jurisdiction in light of the limitations of 28 U.S.C. § 1447(d). We hold that we have jurisdiction to review the district court's ruling on substantive issues of controlling law on the merits of the case. We affirm all of the district court's rulings on those substantive issues, relating principally to

immunity, but hold that the claims against the U.S. government agencies should have been dismissed rather than remanded to state court.

BACKGROUND

The underlying consolidated actions are suits arising from the energy crisis of 2000-2001. *See generally Duke Energy Trading & Marketing, L.L.C. v. Davis*, 267 F.3d 1042 (9th Cir.2001). As a result of the crisis, the State of California, together with some of its private and corporate citizens, filed suits in California state courts against Reliant Energy, Duke Energy and other generators of power in the California energy market (collectively referred to as "Duke and Reliant"). The Plaintiffs alleged that Defendants conspired to fix prices of wholesale electricity in violation of California's Cartwright Act, Cal. Bus. & Prof. Code § 16720, *et. seq.*, and California's Unfair Competition Law, *id.* at § 17200.

Duke and Reliant filed cross-claims in the state court seeking indemnity from two agencies of the United States government, Bonneville Power Administration, ("BPA"), and Western Area Power Administration, ("WAPA"), and from two Canadian entities, PowerEx Corporation, ("PowerEx"), and British Columbia Hydro and Power Authority, ("BC Hydro"). Both BPA and WAPA are agencies of the United States Government statutorily authorized to promote the development, sale, and distribution of electric power in the western United States. *See* 16 U.S.C. § 832; 42 U.S.C. § 7152, 43 U.S.C. §§ 389, 485(h); *see also United States by W. Area Power Admin. v. Pac. Gas & Elec. Co.*, 714 F.Supp. 1039, 1045-47 (N.D.Cal.1989). BC Hydro is a crown corporation of the Canadian province of British Columbia created by the British Columbia Hydro and Power Authority Act of 1964. PowerEx is a wholly owned subsidiary of BC Hydro. PowerEx markets and exports surplus Canadian hydropower to the United States.

Each of the cross-defendants removed the cases to federal court. As the basis for removal, BPA and WAPA invoked 28 U.S.C. § 1442(a), which permits removal by fed-

eral agencies. BC Hydro and PowerEx invoked 28 U.S.C. § 1441(d), which allows removal by foreign states as defined by the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. § 1603(a). California then moved the district court for remand. BPA and WAPA opposed the remand, arguing that they were entitled to be dismissed from the action because they enjoyed sovereign immunity as agencies of the U.S. government. BC Hydro argued for dismissal on the ground that it was an immune foreign sovereign as defined by the FSIA. PowerEx opposed California's motion for remand on the ground it was entitled to remove under the removal statutes 28 U.S.C. § 1441(a)(d) and the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(a). PowerEx did not argue for sovereign immunity because the claim arises from commercial activities PowerEx conducted within the United States. *See* 28 U.S.C. § 1605(a)(2).

The district court ruled first on the immunity arguments. The court held that BC Hydro was entitled to foreign sovereign immunity under the FSIA as a crown corporation of British Columbia. As to the U.S. government agencies, Duke and Reliant contended BPA and WAPA had waived their immunity. The district court held that there had been no waiver because only Congress could waive immunity and Congress had not done so. It therefore held that the WAPA and BPA were immune from suit. Finally, the district court held that PowerEx was not entitled to removal because it was not the instrumentality of a foreign sovereign. Then the district court granted the earlier motion to remand the entire case.

Defendants-appellants, Duke and Reliant, now appeal, challenging the district court's holdings that BPA and WAPA have not waived their sovereign immunity, and that BC Hydro is immune from suit. Cross-appellants, BPA and WAPA, challenge the district court's decision to remand the entire case to state court, contending that the district court should first have dismissed them from the suit. Cross-appellant, PowerEx, challenges the district

court's ruling that it is not a sovereign as defined by the FSIA.

Plaintiff-appellee, California, happy to be back in state court, contends that this court is without jurisdiction to hear any of these appeals. It argues that 28 U.S.C. § 1447(d) prohibits the exercise of appellate jurisdiction over the district court's order of remand and that we therefore cannot review the substantive issues of law the district court resolved.

We first deal with the issue of appellate jurisdiction. We conclude that we have jurisdiction to review the underlying merits of the district court's substantive rulings on immunity and sovereign status. We then turn to the merits of those rulings.

APPELLATE JURISDICTION

The district court's final order that is on appeal to this court remands the case to state court following its original removal to federal court. Section 1447(c) provides that a motion for remand for procedural irregularities in the removal must be filed within 30 days and that a case may be remanded at any time if it appears that the district court lacks subject matter jurisdiction.[1]

Appellate review of a remand order pursuant to § 1447(c) is limited by the provisions of § 1447(d). Section 1447(d) provides:

> (d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

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[1] Section 1447(c) provides:

> c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

The limitation relates on its face only to appellate review of federal jurisdiction or of whether the remand order itself was procedurally correct. Our court has therefore recognized that the limitations on review in § 1447(d) do not preclude our review of substantive issues of law that may have preceded the remand order. We have said that § 1447(d) "preclude[s] only appellate review of remand orders based on one of the two grounds listed in subsection 1447(c): lack of subject matter jurisdiction or removal procedure irregularities." *United Investors Life Ins. Co. v. Waddell & Reed*, 360 F.3d 960, 963 (9th Cir.2004), *citing Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28, 116 S.Ct. 494, 133 L.Ed.2d 461 (1995). Section 1447(d) does not preclude our review of a district court's resolution of substantive issues on the merits, apart from issues of jurisdictional or procedural defects leading to remand. *See Abada v. Charles Schwab & Co.*, 300 F.3d 1112, 1118 (9th Cir.2002), *citing Clorox Co. v. United States Dist. Ct.*, 779 F.2d 517, 520 (9th Cir.1985) and *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-77 (9th Cir.1984).

Moreover, the district court had jurisdiction over this case because BPA, WAPA and BC Hydro properly removed the case from state court. Such a removal removes the *entire* case, not merely the portion affecting the removing sovereign. *See IMFC Professional Services of Fla., Inc. v. Latin American Home Health, Inc.*, 676 F.2d 152, 158-59 (5th Cir.1980); *Nolan v. Boeing Co.*, 919 F.2d 1058, 1064-65 (5th Cir.1990). The district court accordingly did not lack jurisdiction to decide the issues of immunity of BPA, WAPA and BC Hydro and of the sovereign status of PowerEx. We accordingly are not deprived by § 1447(d) of jurisdiction to review these substantive rulings, and we now address them on their merits.

IMMUNITY OF THE U.S. AGENCIES: BPA AND WAPA

Reliant and Duke argue that the federal agencies waived their immunity by acting as generators, buyers, and sellers of electricity in the California energy markets. Specifically, Duke and Reliant contend that by agreeing to the Federal Energy Regulatory Commission, ("FERC"), tariff governing the California market, BPA and WAPA were bound by the provisions of the tariff. Under the tariff, participants in the California energy market "irrevocably waive any objection" to the jurisdiction of California courts over legal actions arising from the tariff. In essence, Duke and Reliant contend that by performing their statutory function to provide power to the western markets, BPA and WAPA became "participants" in that market within the meaning of FERC tariffs and thereby waived their governmental immunity.

The district court rejected the arguments of Duke and Reliant and concluded that BPA and WAPA did not waive their sovereign immunity. This ruling was correct because only Congress can waive immunity of a federal governmental agency and BPA and WAPA are indisputably such agencies.

In *Lane v. Pena*, 518 U.S. 187, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996), the Supreme Court unambiguously reaffirmed that "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed [by Congress] in statutory text." *Id.* at 192, 116 S.Ct. 2092. Duke and Reliant point to no such text waiving the immunity of BPA or WAPA. Nor is there a statute waiving the sovereign immunity of BPA or WAPA with regard to suits for indemnity. *See* 16 U.S.C. § 832; 43 U.S.C. § 390uu; *see also City of Tacoma v. Richardson*, 163 F.3d 1337, 1339-41 (Fed.Cir.1998) (interpreting section 390uu and holding Congress has waived WAPA's sovereign immunity only with regard to contracts executed pursuant to federal reclamation law). The district court correctly concluded that BPA and WAPA retain their sovereign immunity.

IMMUNITY OF BC HYDRO UNDER THE FSIA

The district court held that BC Hydro was an immune foreign sovereign as defined by the Foreign Sovereign Immunities Act and was therefore not amenable to suit by Duke and Reliant. Under the FSIA, BC Hydro waived its foreign sovereign immunity if it: 1) conducted commercial activity in the U.S., or 2) engaged in commercial activity outside the U.S. having a "direct effect" in the United States. 28 U.S.C. § 1605(a)(2). Duke and Reliant argue that BC Hydro did both.

Duke and Reliant first argue that BC Hydro activity in Canada had a direct effect on California energy markets. They claim that BC Hydro made decisions that restricted how and with whom PowerEx, BC Hydro's exporting subsidiary, could trade. Because BC Hydro's decisions determined who in the California market received energy from PowerEx and at what price, Duke and Reliant claim that BC Hydro directly affected that market. Duke and Reliant also claim that BC Hydro's credit decisions were themselves commercial activities and therefore caused BC Hydro to forfeit its immunity.

A "direct effect" in the United States must follow "as an immediate consequence of [the otherwise immune defendant's] activity." *Argentina v. Weltover*, 504 U.S. 607, 618, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). The actions of BC Hydro did not cause direct effects in the United States within the meaning of the FSIA. Although the credit decisions of BC Hydro had a direct effect on PowerEx, it was only the decisions of PowerEx that directly affected the California markets. Because the credit decisions affected an intermediary, whose actions in turn affected the U.S., the decisions did not have direct effects within the United States. *See Corzo v. Banco Central De Reserva Del Peru*, 243 F.3d 519, 525 (9th Cir.2001).

Duke and Reliant also contend that BC Hydro lacks immunity in the case because its decisions about how to generate power and about how much power PowerEx could sell to the California markets were commercial acts with

direct effects in the U.S. The district court correctly held, however, that these decisions were sovereign functions, not commercial ones. BC Hydro is responsible for decisions relating to, for example, flood control, management of fisheries, and construction of dams. These are governmental responsibilities, unlike any responsibilities of a private, commercial actor. The ability to make decisions about the management of natural resources is a uniquely sovereign capacity. *See MOL, Inc. v. People's Republic of Bangladesh*, 736 F.2d 1326, 1329 (9th Cir.1984).

Next, appellants argue that PowerEx is the agent of BC Hydro and that BC Hydro waived its immunity by and through the conduct of its agent. The district court correctly held that there was no agency relationship between BC Hydro and PowerEx. Independence is to be presumed. In *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) ("*Bancec*"), the Supreme Court announced that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-27, 103 S.Ct. 2591. The presumption of independence is defeated only "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created." *Id.* at 629, 103 S.Ct. 2591; *see also Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1070-71 (9th Cir.2002).

As the district court carefully explained, no evidence suggests that BC Hydro exerted the day-to-day control over PowerEx that would demonstrate an agency relationship. *Cf. Flatow*, 308 F.3d at 1071-73 (noting absence of a showing of day-to day-control and rejecting agency argument). BC Hydro undoubtedly cooperated with PowerEx to establish PowerEx's credit risk policies and to provide PowerEx with administrative and other support for its operations. As the Supreme Court has noted, however, it is not at all remarkable for a parent organization to supervise the "finance and capital budget decisions" and to be

responsible for the "articulation of general policies and procedures" for a subsidiary. *United States v. Bestfoods*, 524 U.S. 51, 72, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998). These areas of cooperation are completely characteristic of a parent-subsidiary operation, and not at all like a principle-agent relationship. The district court correctly concluded that PowerEx was not the agent of BC Hydro.

For all of the foregoing reasons, BC Hydro did not waive its sovereign immunity under the FSIA.

SOVEREIGN STATUS OF POWEREX UNDER THE FSIA

In its cross-appeal PowerEx argues that the district court erred in holding that it is not a foreign sovereign under the FSIA, and that it therefore is not entitled to remove under § 1441(d). The statute defines a foreign sovereign as including "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). An agency or instrumentality is defined as any entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). PowerEx argues that it is a foreign sovereign both because it is an "organ" of a foreign state and alternatively because it is wholly owned by a foreign state.

In support of its contention that PowerEx is an organ of Canada, PowerEx cites this court's recent decision in *EIE Guam Corporation v. Long Term Credit Bank of Japan*, 322 F.3d 635, 640-41 (9th Cir.2003). In *EIE Guam*, we held that a Japanese corporation was an organ of Japan where that corporation (RCC) was created to collect and

administer bad debts of failed financial institutions insured by the Deposit Insurance Corporation of Japan. *Id.* at 640.

PowerEx argues that just as RCC served a public purpose in helping to manage the debts of failed Japanese banks, PowerEx serves a public purpose in maximizing the value of the Province's surplus hydropower. This is the only material similarity, however. There are substantial differences between PowerEx and RCC. In *EIE Guam*, the district court found that many of RCC's functions were exclusive, that other companies were not permitted to take similar actions, that RCC was funded by the Japanese government, and that the government even compensated RCC for its financial losses. *See id.* at 640.

In contrast, the district court here found that PowerEx acted not in the public interest, but rather as an independent commercial enterprise pursuing its own profits. The district court also found that any profits and losses from its sales of power are solely the responsibility of PowerEx and are in no way guaranteed or subsidized by the government. The Canadian government does not immunize PowerEx from suit.

We have said that the ultimate question is "whether the entity engages in a public activity on behalf of the foreign government." *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir.2001), *aff'd on other grounds Dole Food Co. v. Patrickson*, 538 U.S. 468, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003). Applying *Patrickson*, we look to the purposes of an entity's activities, the entity's independence from government, the level of financial support received from the government, and the entity's privileges and obligations under the law. *Patrickson*, 251 F.3d at 807.

As the district court correctly noted, the facts of this case closely mirror the facts of *Patrickson* and compel our conclusion that PowerEx is not an organ of a foreign government. In *Patrickson*, as here, the party claiming organ status under the FSIA was not run by government appointees, was not staffed with civil servants, was not

wholly owned by the government, was not immune from suit, and did not exercise any regulatory authority. *See Patrickson*, 251 F.3d at 808. Even though PowerEx offers some evidence that it serves a public purpose, its high degree of independence from the government of British Columbia, combined with its lack of financial support from the government and its lack of special privileges or obligations under Canadian law dictate our holding that PowerEx is not an organ of British Columbia.

PowerEx also argues that it qualifies under the FSIA because it is owned by the Province of British Columbia. PowerEx concedes, however, that its shares are owned by BC Hydro. The Supreme Court has held that "only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement [of the FSIA]." *Dole Food*, 538 U.S. at 474, 123 S.Ct. 1655. The Court noted that formalities are essential in the law of corporations and that unless the foreign government itself actually owns the shares, the entity does not meet the definition of a foreign state. *Id.* at 474-76, 123 S.Ct. 1655. PowerEx is not owned by the Province but by BC Hydro. It is therefore not a foreign instrumentality under FSIA.

THE REMAND OF CLAIMS AGAINST THE UNITED STATES

In their cross-appeal, BPA and WAPA argue that although the district court correctly held them immune from suit, it incorrectly failed to dismiss the claims against them. They are correct.

Section 1442(a) guarantees federal agencies a federal forum in which to adjudicate claims. Where it is immune from suit, a federal agency's right to a federal forum is vindicated only by the district court's dismissal of the claims against the agency. Any other outcome would frustrate the purpose of § 1442(a).

We have previously held that where federal law prevents state and federal courts from subjecting a federal agency to suit, a district court presented with such a suit

is required to dismiss it. *See Nebraska v. Bentson*, 146 F.3d 676, 679 (9th Cir.1998). The same result is required here. We therefore remand the claims against BPA and WAPA with instructions to dismiss them.

CONCLUSION

We AFFIRM the district court's decision that BC Hydro is an immune foreign sovereign under the Foreign Sovereign Immunities Act, but that its export subsidiary, PowerEx, is not such a sovereign or instrumentality of a sovereign. We also AFFIRM the district court's order that BPA and WAPA are immune from suit. We VACATE the portion of the district court's order remanding the claims against BPA and WAPA and instruct the district court to enter an order of dismissal.

AFFIRMED IN PART; VACATED IN PART and REMANDED. Costs are awarded to BPA, WAPA, and BC Hydro and against PowerEx.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Coordination Proceeding Special Title (Rule 1550(b))

WHOLESALE ELECTRICITY ANTITRUST CASES I & II

Nos. CV 02-0990-RHW
CV 02-1000-RHW
CV 02-1001-RHW

This Document relates to:
ALL ACTIONS

RELIANT ENERGY SERVICES, INC., ET AL.,
Defendants and Cross-Complaints,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-Defendants.

ORDER GRANTING MOTION TO REMAND

Before the Court is Plaintiffs' Motion to Remand and Motion to Strike and/or Sever Cross-Complaints (Ct. Rec. 58). A hearing was held on September 19, 2002 in San Diego, California. Plaintiffs, Defendants, and Cross-Defendants were present and represented by counsel.

PROCEDURAL BACKGROUND

The Court is familiar with these consolidated cases, as a lengthy procedural history predates the present motion. The first of these actions was filed in California state court on November 27, 2000. Subsequently, five additional actions were filed. The Defendants removed each of the actions to federal court on the grounds that the Federal Power Act completely preempted Plaintiffs' claims. On July 31, 2001, this Court remanded the actions back to the

California superior courts. *See Hendricks v. Dynergy Power Mktg., Inc.*, 160 F. Supp. 2d 1155 (S.D. Cal.2001).

On April 22, 2002, Defendants Reliant Energy Services, Inc. ("Reliant") and Duke Energy Trading and Marketing, L.L.C. ("Duke") filed cross-complaints, asserting causes of action for declaratory relief and indemnity, and naming as cross-defendants, *inter alia*, two federal agencies – the Bonneville Power Administration ("BPA") and the Western Area Power Administration ("WAPA") – and Powerex Corporation ("Powerex"), a corporation allegedly owned indirectly by the Province of British Columbia, Canada. The Reliant cross-complaint also named as cross-defendants two entities owned directly by foreign states – British Columbia Hydro and Power Authority ("BC Hydro"), owned by the Province of British Columbia, Canada, and the Comision de Federale Electricidad, a public agency of Mexico.[2]

On May 21, 2002, the cross-claim Defendants removed the actions to federal court. (Ct. Rec. 1.) BC Hydro removed the actions under 28 U.S.C. § 1441(d), which allows a foreign state to remove a civil action filed against it in state court to federal court. Two days later, BPA filed a Notice of Additional Ground for Removal, invoking 28 U.S.C. § 1442(a)(1) as grounds for removal. (Ct. Rec. 3.) Section 1142(a)(1) allows the United States, or one of its agencies, to remove a civil action filed against it in state court to federal court. Plaintiffs now move to remand those actions to the state courts from whence they came or, in the alternative, strike and/or sever the cross-complaints.

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[2] The Court notes that the Comision de Federale Electricidad has not moved to remove this case to federal court. As such, this Court will not address whether it has subject matter jurisdiction over it. *See* § 1441(d).

DISCUSSION

I. Subject Matter Jurisdiction Over the Removed Actions

None of the parties contend that the cross-claimants could not remove these actions under the provisions of 28 U.S.C. §§ 1441 and 1442. Rather, Plaintiffs argue that the Court lacks jurisdiction over the removed actions and, as such, they must be remanded. The issue hinges, then, on the Court's jurisdictional authority to hear the removed claims, not whether the actions were properly removed in the first instance.

A. Jurisdiction Over the "Foreign State" Cross-Defendants

28 U.S.C. § 1441(d) allows a "foreign state" to remove an action brought in state court to federal court.[3] The Federal Sovereign Immunities Act ("FSIA") defines a foreign state as:

> (a) A "foreign state". . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality" of a "foreign state" means any entity –
>
> > (1) which is a separate legal person, corporate or otherwise, and
> >
> > (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof. . .

28 U.S.C. § 1603.

FSIA immunizes foreign states and their instrumentalities from the jurisdiction of the United States courts

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[3] In pertinent part, 28 U.S.C. § 1441(d) provides that "[a]ny civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state [to federal court]." *See* 28 U.S.C. § 1441(d).

unless the matter falls within one of the statutory exceptions to sovereign immunity under the Act. *See id.*; *see also Security Pac. Nat'l Bank v. Derderian*, 872 F.2d 281, 283 (9th Cir. 1989). In regard to Plaintiffs' remand motion, the only relevant exception is the "commercial activity" exception contained in 28 U.S.C. § 1605(a)(2). That exception states in relevant part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .
>
> > (2) in which the action is based upon a *commercial activity carried on in the United States* by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a *direct effect* in the United States . . .

28 U.S.C. § 1605(a)(2) (emphasis added). Thus, federal jurisdiction over a foreign party does not attach until the Court determines that the foreign sovereign lacks immunity from jurisdiction under the provisions of FSIA. *See Derderian*, 872 F.2d at 283-284. If the Court has jurisdiction over any one of the foreign sovereigns, then it has jurisdiction over the entire case. *See* 28 U.S.C. § 1441(d); *see also Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1407 (9th Cir. 1989).

1. BC Hydro

Because BC Hydro is a corporation wholly-owned by a political subdivision of a foreign government, all of the parties agree that it qualifies as a "foreign state" under § 1603 of the FSIA. *See* 28 U.S.C. § 1603(a). Thus, the sole question is whether BC Hydro is entitled to sovereign immunity because none of the statutory exceptions apply.

The only exception to immunity that the parties contend is potentially relevant to BC Hydro is the "commercial ac-

tivity" exception included in 28 U.S.C. § 1605(a)(2). As noted, BC Hydro does not enjoy immunity under that exception if Defendant's cross-claims are based upon either (1) a commercial activity carried out by BC Hydro in the United States, or (2) a commercial activity BC Hydro engaged outside the United States that had a "direct effect" in the United States.[4] *See id.*

Beginning with the first portion of the commercial activity exception – "a commercial activity carried out in the United States" – the FSIA defines this phrase to mean "commercial activity carried on by [a foreign] state and having substantial contact with the United States." 28 U.S.C. § 1603(e). This definition, therefore, has two parts. First, there must be commercial activity, which the FSIA further defines as "either a regular course of commercial conduct or a particular commercial transaction or act." *Id.* at § 1603(d). Second, that commercial activity must have "substantial contact" with the United States.

Both Plaintiffs and Cross-Defendant BC Hydro allege that BC Hydro never has carried out any commercial activity in the United States. Defendants, on the other hand, assert two manners in which BC Hydro supposedly did, indeed, carry out such commercial activity. First, Defendants assert that BC Hydro sold power directly into California on its own behalf. Second, Defendants claim that BC Hydro sold power into California though its agent, Powerex, which they, in turn, argue satisfies the "commercial activity" exception.

The parties dispute who carries the burden of proof that an exception under the FSIA applies. The Ninth Circuit has made clear, however, that once a plaintiff offers evidence that a FSIA exception applies, the party claiming immunity bears the burden of proving, by a preponderance of the evidence, that the exception does not apply.

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[4] None of the parties implicate the exception for acts "performed in the United States in connection with a commercial activity of the foreign state elsewhere . . ." 28 U.S.C. § 1605(a)(2).

See Gates v. Victor Fine Foods, 54 F.3d 1457, 1463 (9th Cir. 1995); *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987). Thus, Plaintiffs and Cross-Defendant BC Hydro carry the burden of proof to show that the commercial activity exception does not apply.

(a) BC Hydro Sales in the United States

Plaintiffs maintain that BC Hydro does not sell, and never has sold, power in the California energy market. Plaintiffs note as support for this contention that BC Hydro is not included in the Federal Energy Regulatory Commission's ("FERC") "Market Based Rates List," which lists every company that either is or was authorized to sell power in the United States. *See* 16 U.S.C. § 824d(c) (power marketer that seeks to engage in electricity sales under the jurisdiction of FERC must place rate schedule on file with Commission). Defendants disagree and argue that BC Hydro sold power directly into California. Defendants cite to statements in BC Hydro's annual reports for the years 2001 and 2002 as the primary support of their claims.[5] BC Hydro, however, maintains that its annual reports describe not only the activities of BC Hydro, but also all of its subsidiaries, including BC Hydro's marketing agent, Powerex and, thus, do not demonstrate that BC Hydro itself sold power in the California market.

It does appear that the annual reports include the trading activities of BC Hydro's principally-owned subsidiaries, including Powerex. The 2002 Annual report expressly states that the financial statements "include BC Hydro and its principal wholly-owned operating subsidiar[y] . . . Powerex Corp." The 2001 Annual report is replete with references to Powerex as well. (Ct. Rec. 96.) Thus, the fact that BC Hydro's annual reports also cover the activi-

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[5] One statement in the annual reports, which is representative of the majority of those cited by Defendants in their briefing, states "BC Hydro . . . continues to sell on a short term payment basis to the California market." (Ct. Rec. 96.)

ties of its subsidiaries undermines the Defendants' offered proof that BC Hydro itself conducts commercial activity in the United States.

Other evidence in the record bolsters the conclusion that BC Hydro, in fact, does not itself conduct commercial activity within the United States. For instance, BC Hydro's Treasurer, Ms. Lambert, attests to the fact that BC Hydro conducts no business in California, as alleged by Defendants. (Ct. Rec. 114.) Moreover, BC Hydro's Principle Engineer, Mr. Spafford, attests that the National Energy Board of Canada permits that BC Hydro holds do not allow it to export power to the United States in exchange for money. (Ct. Rec. 113.) Mr. Spafford also explains that BC Hydro does not possess an export permit from FERC. *Id.* Lastly, Powerex's President, Mr. Peterson, attests that BC Hydro has not sold power at points of delivery in the Untied States and that BC Hydro sells its surplus energy to Powerex at the provincial border. (Ct. Rec. 89.) Mr. Spafford also attests to this fact. (Ct. Rec. 113.) This evidence – that BC Hydro has not submitted to FERC regulation, and testimony from its own officers and an officer of Powerex that BC Hydro does not sell energy directly into the California market – shows by a preponderance that BC Hydro did not sell energy directly into the United States.

(b) Powerex's Sales in the United States

Although the Ninth Circuit has never ruled directly on the issue, the Eighth Circuit has held that a foreign state can surrender its immunity under the commercial activity exception by virtue of activities committed by its agent. *See BP Chemicals, Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677 (8th Cir. 2002). Thus, the question here becomes whether Powerex acted as BC Hydro's agent in a manner capable of invoking the commercial activities exception.

The parties dispute the test that the Court should employ to determine whether an agency relationship exists. Defendants suggest that the proper test to use is the "important function" test. That test is derived, however, from cases in which a court considered whether an agency rela-

tionship existed between a parent and its subsidiary sufficient to impute the subsidiary's "minimum contacts" to the parent for the purposes of establishing personal jurisdiction. *See, e.g., Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001) ("[I]f the parent and subsidiary are not really separate entities, or one acts as an agent for the other, the local subsidiary's contacts with the forum may be imputed to the foreign parent corporation."); *Modesto City Schools v. Riso Kagaku Corp.*, 157 F.Supp.2d 1128, 1132 (E.D. Cal. 2001) ("It is well established that a parent-subsidiary relationship alone is insufficient to attribute the contacts of the subsidiary to the parent for jurisdictional purposes."). Thus, the Ninth Circuit has employed the "important function" test for a distinctly different purpose than that of determining whether an agency relationship exists for purposes of imputing the subsidiary's "commercial activity" to the parent under the FSIA. Moreover, use of a test utilized to determine "minimum contacts" is inappropriate here because the statute requires that "commercial activity" have "*substantial contact*" with the United States.

Rather, the correct legal standard is derived from the Supreme Court's decision in *First National City Bank v. Bunco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983) (hereafter "*Bancec*"). *Bancec* remains the seminal case on the circumstances under which American courts may disregard the separate status of instrumentalities created by foreign governments.

In *Bancec*, the Supreme Court announced a presumption that "duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." 462 U.S. at 627. Thus, the *Bancec* Court recognized that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.*

The presumption of separate legal status may be overcome "where a corporate entity is so extensively controlled by its owner that a relationship of principle and agent is

created."[6] *Id.* at 629. The Court in *Bancec* outlined features it attributed to an ordinary, separate government instrumentality:

> A typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law. The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply. [footnote omitted]. These distinctive features permit government instrumentalities to manage their operations on an enterprise basis while granting them a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies. [footnote omitted].

Id. at 624-25. The Supreme Court was careful to note, however, that it was not creating an exhaustive list of criteria for disregarding the corporate form of another sovereign state's instrumentalities. *See id.* at 633-34 ("Our decision today announces no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded."). Thus, the issue is highly fact bound.

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[6] The Supreme Court also indicated that the presumption can be overcome in instances where recognition of the instrumentality as an entity separate from the state "would work fraud or injustice." *Id.* The parties have not indicated that this exception inapplicable to the case at bar.

See Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines, 965 F.2d 1375, 1382 (5th Cir. 1992).

Since *Bancec*, the issue of whether an instrumentality is genuinely separate from the government that owns it has arisen a number of times in federal court. The issue of how much control the sovereign exercised over the instrumentality has been key in these decisions. *See, e.g., Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843 (D.C. Cir. 2000); *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292 (11th Cir. 2000). In this regard, the "direct control" test for determining agency under the FSIA enunciated by the D.C. Circuit in *Transamerica* is particularly helpful. There, the court stated:

> At a minimum, however, we can confidently state that the relationship of principal and agent does not obtain unless the parent has manifested its desire for the subsidiary to act upon the parent's behalf, the subsidiary has consented so to act, the parent has the right to exercise control over the subsidiary with respect to matters entrusted to the subsidiary, and the parent exercises its control in a manner more direct than by voting a majority of the stock in the subsidiary or making appointments to the subsidiary's Board of Directors.

200 F.3d at 849.

Defendants bear the burden of proving that Powerex was so extensively controlled by BC Hydro that Powerex became the agent or alter ego of BC Hydro.[7] *See Arriba*

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[7] It is important not to confuse the use of the term "agency" in this case, as it is used in two distinct manners. Under § 1603(b), the FSIA indicates that an "agency" of a foreign state may qualify for foreign sovereign immunity itself. This is completely different from the question of whether a foreign state and its agency or instrumentality are alter egos for purposes of invoking the commercial activities exception under § 1605(a)(2). Although such an alter ego relationship may be described in terms of "agency," it is a different inquiry than that which might be conducted under § 1603. The level of state control required to establish an "alter ego" relationship is more extensive than that required to establish FSIA "agency." *See Walter Fuller Aircraft Sales,*

Ltd. v. Petroleos Mexicanos, 962 F.2d 528, 533 (5th Cir. 1992). Defendants' briefing sets out a litany of facts relating to this question. Not all of those facts can be recited here, but the key facts that Defendants deem particularly relevant are broadly categorized as follows:

- **Powerex is subject to BC Hydro's Commodity Risk Management Policy:** Powerex is subject to a risk management policy established and maintained by BC Hydro. The policy describes the risk management infrastructure that serves as an oversight mechanism of Powerex's financial decisions. The policy specifies business activities that Powerex is permitted to engage in, and corresponding limits on those activities. The policy is overseen by the BC Hydro Risk Management Committee ("RMC"). The RMC is a subset of the BC Hydro Corporate Management Committee and reports to the BC Hydro President and CEO. The policy includes certain reporting protocols that Powerex must follow, and transaction limits applicable to Powerex. Any energy trade Powerex wishes to make outside the parameters of the policy must be approved by the RMC. (Ct. Rec. 96 and 138.)
- **BC Hydro and Powerex Work Closely in Managing Generation Assets:** When it comes to optimization of BC Hydro's generation assets, Powerex's relationship with BC Hydro is intended to be very close. A conscious effort is made to share information between BC Hydro and Powerex. Communication and coordination processes ensure that energy transactions are beneficial from a corporate-wide perspective. Information about BC Hydro's generating capacity and value drives Powerex's trading strategy. Hour-to-hour coordination takes place between the BC Hydro operations shift engi-

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965 F.2d at 1381 (citing *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 176 n.5 (5th Cir. 1989)).

neer and the Powerex Real Time trader. The Powerex trader identifies market opportunities, and the BC Hydro engineer determines the amount of generating capacity available for trade. (Ct. Rec. 96.)

- **Powerex Markets and Exports Power on BC Hydro's Behalf:** Defendants point to several statements made in various press releases, reports, public documents, and internal memos that indicate that Powerex is the sole marketer of BC Hydro exports and that BC Hydro is reliant on Powerex to carry out its export functions.

Plaintiffs and Cross-Defendant BC Hydro refute the significance of this information and maintain that Powerex retains its independent status.

The Court agrees with Plaintiffs and Cross-Defendant BC Hydro. A careful review of the evidence submitted by the Defendants shows that Defendants have failed to come forward with sufficient evidence to carry their burden and overcome the presumption that Powerex maintains its separate juridical status.

Defendants rely heavily on the evidence concerning the existence and operation of the RMC. In *Doe v. Unocal Corp.*, 248 F.3d 915, 927 (9th Cir. 2001), the Ninth Circuit held, however, that "[a] parent corporation may be directly involved in financing and macro-management of its subsidiaries . . . without exposing itself to a charge that [its] subsidiary is merely its alter ego."[8] Appropriate parental involvement includes "'monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures[.]'" *Id.* (quoting *United States v. Best Foods*, 524 U.S. 51, 72 (1998)). Parental oversight of the

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[8] *Doe* does not involve a determination of alter ego status under the FSIA. In *Bancec*, however, the Supreme Court drew from American corporate law regarding the circumstances in which a corporation could be held not to be a separate entity from its owners. *See Bancec*, 462 U.S. at 623.

financial risks its subsidiaries can assume is a standard parental function. Thus, the risk control policies set out in the BC Hydro Commodity Risk Management Policy cannot be construed as the type of control necessary to disregard Powerex's independent status. This conclusion is buttressed by the very wording of the policy itself, which states that the responsibilities of the BC Hydro Manager of Commodity Risk "do[] not include oversight of daily business activities" but instead provide independent oversight to "ensure[] Powerex adheres to [the risk management] policies." (Ct. Rec. 163.)

The other evidence offered by Defendants also falls short. The fact that BC Hydro and Powerex personnel work closely together to optimize the best value that can be obtained for BC Hydro's energy assets does not show direct control. Rather, Plaintiffs and Cross-Defendant BC Hydro have offered credible evidence that, outside of the oversight of the RMC, BC Hydro has no supervision over Powerex's day-to-day trading activity in the energy market. Powerex independently determines the quantity of BC Hydro surplus power to export, and independently determines what parties it will trade with and on what terms. There is simply no evidence in the record that BC Hydro exerts operational control over the quantities and prices at which Powerex sells electricity. *Cf. Doe*, 248 F.3d at 926 (stating alter ego test is satisfied "where the record indicates that the parent dictates '[e]very facet [of the subsidiary's] business – from broad policy decisions to routine matters of day-to-day operation[.]'") (citations omitted). Thus, while the two entities share many of the same objectives and seem to coordinate their operations to large extent, it cannot be said that BC Hydro has the right to exercise or, in fact, does exercise, "direct control" over the fundamental export and marketing functions entrusted to Powerex.

Lastly, it is evident that Powerex does not market and export energy "on BC Hydro's behalf." Powerex was created as a separate legal entity by Provincial directive.

Prior to the creation of Powerex, BC Hydro never sold power in the United States. Moreover, testimony from BC Hydro and Powerex officials indicates that even if Powerex did not exist, BC Hydro would not itself engage in Powerex's trading scheme. (Ct. Rec. 113 and 138.) The excerpts taken from various documents offered by Defendants do not provide any probative evidence that Powerex indeed acts on BC Hydro's behalf. As such, there is no evidence that BC Hydro has manifested its desire for Powerex to act upon its behalf and, thus, Powerex cannot be said to act as BC Hydro's agent. *See Transamerica Leasing*, 200 F.3d at 849.

In sum, the sort of "extensive control" described in *Bancec* simply does not exist here. Powerex in fact possesses most of the characteristics of what *Bancec* referred to as the "typical government instrumentality."

(c) BC Hydro Commercial Activity with a Direct Effect in the United States

Defendants also maintain that the exception included in the third clause of § 1605(a)(2) is applicable, claiming that their cross-claims are "based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). Thus, to trigger this exception, the Court must determine that BC Hydro committed an act in British Columbia that was (a) "commercial" in nature, and (b) that caused a "direct effect" in the United States.

As noted, FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." *Id.* § 1603(d). In *Republic of Argentina v. Weltover*, 504 US, 607, 612 (1992), the Supreme Court further refined this definition, stating that "when a foreign government acts, not as a regulator of the market, but in a manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Id.* at 614. It further explained that "the question is not whether the foreign government

is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'" *Id.*

The Court believes that BC Hydro's generation of hydro power within British Columbia is an exercise of sovereign power, rather than commercial activity. On behalf of the Province, BC Hydro operates an electric utility involved in generation, transmission, and distribution of energy that services the majority of citizens in British Columbia. (Ct. Rec. 113.) BC Hydro also constructs dams, storage facilities, and reservoirs. *Id.* BC Hydro also practices flood control and manages fisheries and ecosystems. *Id.* None of these activities are the type of actions in "which a private party engages in trade and traffic or commerce."

Turning to the second question, the issue is whether BC Hydro's acts caused a "direct effect" in the United States. The Supreme Court has interpreted the "direct effect" language included in FSIA to mean "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity." *Weltover*, 504 U.S. at 618. Following *Weltover*, the Ninth Circuit advanced the rule that a direct effect requires that "legally significant acts giving rise to the claim occurred" in the United States. *See Alder v. Federal Republic of Nigeria*, 219 F.3d 869, 876 (9th Cir. 2000). Thus, in the "direct effects" analysis, the Court "should focus on whether some intervening act broke the chain of causation leading from the asserted wrongful act to its impact in the United States." *See Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1083 (9th Cir. 2001).

Defendants accuse Cross-Defendant BC Hydro of "manipulating supply," engaging in "restrictive trade practices," and carrying on "trade practices in British Columbia that had a direct effect in California." (Ct. Rec. 1.) It appears, however, that BC Hydro simply delivered energy to Powerex, and Powerex independently marketed and

sold the power into the California markets. Thus, there is no direct linkage between BC Hydro's generation activities within British Columbia and Powerex's sales activities within the United States. Any "direct effect" on the California energy markets was perpetrated by Powerex. Defendants' claims do not follow as an "immediate consequence" of BC Hydro's activities, as all of BC Hydro's activities were restricted to British Columbia and Defendants' claims hinge on Powerex's trading activities in the California market. Therefore, in sum, the exception for commercial activity with "direct effects" inside the United States cannot be properly applied to BC Hydro. BC Hydro's acts are sovereign in nature, and even if construed as "commercial," do not appear to have "direct effects" within the United States.

2. Powerex

The situation concerning whether the Court has jurisdiction over Powerex is the opposite of that regarding BC Hydro: Plaintiffs concede that Powerex engaged in "commercial activity" in the California energy market; thus, the only question regarding Powerex is whether it qualifies as a foreign sovereign under the FSIA. If it does so qualify, it cannot claim immunity under the "commercial activity" exception, and jurisdiction attaches.

To establish Powerex as a foreign sovereign, Defendants argue that Powerex is an instrumentality of a foreign state under FSIA. *See* 28 U.S.C. § 1603. The FSIA grants the federal courts jurisdiction over an action brought against "an agency or instrumentality of a foreign state," *id.* § 1603(a), which is defined to include any entity that is "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." *Id.* § 1603(b)(2). Therefore, to be an "agency or instrumentality," the entity must *either* be an "organ of a foreign state" or have a majority of its shares owned by "a foreign state or political subdivision thereof."

(a) "Organ" Status Under the FSIA

Defendants first argue that Powerex is an "organ" of the British Columbia government under § 1603(b)(2). In defining whether an entity is an organ, courts consider whether the entity engages in a public activity on behalf of the foreign government. *See Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001). In making this determination, courts examine the circumstances surrounding the entity's creation, the purpose of its activities, its independence from the government, the level of government financial support, its employment policies, and its obligations and privileges under state law. *See Corporacion Mexicana de Servicios Maritimos, de Servicios Maritimos v. M/T Respect*, 89 F.3d 650, 654-55 (9th Cir. 1996); *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1461 (9th Cir. 1995). The entity may be an organ even if it has some autonomy from the foreign government. *See Gates*, 54 F.3d at 1461.

In *Gates*, the Ninth Circuit held that an industry board that regulated the Canadian pork market was an "organ" where it exercised regulatory authority delegated by the government; its decisions could be appealed to a government agency; and its members enjoyed immunity from suit for their official duties. *See id.* In *Corporacion Mexicana*, the Ninth Circuit held that a Mexican oil refinery was an organ where it was entirely owned by the government, controlled by government appointees, employed only public servants; and had the exclusive responsibility for refining and distributing Mexican property. *See* 89 F.3d at 654-55.

Conversely, in *Patrickson*, the Ninth Circuit held that two chemical companies were not "organs" of the Israeli government, even though they were classified as "government companies" under Israeli law, the government had the right to approve the appointment of directors and officers, as well as any changes in capital structure of the companies, and the government could constrain the use of the companies' profits. *See* 251 F.3d at 808. The court held that this control was "not considerably different from the control a majority shareholder would enjoy under

American corporate law." *Id.* Instead, the court found persuasive that the companies "were not run by government appointees, their employees were not treated as civil servants, nor were the [c]ompanies wholly owned by the government of Israel . . . [n]or did the [c]ompanies exercise any regulatory authority." *Id.*

Most of the facts that existed in *Gates* and that were important to the Ninth Circuit's decision do not exist in regard to Powerex here: the record does not indicate that Powerex maintains any indicia of regulatory authority (Ct. Rec. 138); Powerex does not enjoy immunity from suit, *id.*; and Powerex is not subject to the type of active governmental oversight described in *Gates*. Indeed, as to this last point, Powerex appears to operate autonomously with little, if any, oversight of its daily trading activities by government officials. *See, supra*, discussion in Section I.A.1(b); *Patrickson*, 251 F.3d at 807 (entity's "independence from the government" a factor which must be considered in determining whether it is an organ of a foreign state"). In contrast to the oil refinery at issue in *Corporacion Mexicana*, Powerex is not run by government appointees and its employees are not treated as civil servants.[9] Thus, *Gates* and *Corporacion Mexicana* are distinguishable on the facts before the Court.

Rather, the facts present here are closely analogous to those present in *Patrickson*. Nearly all the facts applica-

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[9] The Court notes that BC Hydro's board of directors are appointed by the government, and, in turn, BC Hydro's directors appoint Powerex's board of directors. (Ct. Rec. 89.) Because the Province does not directly appoint the Powerex directors, the Court finds that Powerex directors do not constitute "government appointees." Likewise, Powerex's employees are not civil servants because Powerex employees are hired by the company, and are not hired by the government. *Cf. Holden v. Canadian Consulate*, 92 F.3d 918, 921 (9th Cir. 1996) ("Because private parties cannot hire . . . civil service . . . personnel, such hiring is necessarily governmental."). Also illustrative is the fact that the employees are eligible for unique profit sharing bonuses not otherwise found in civil service compensation programs in the Province. (Ct. Rec. 138.)

ble to Powerex and set out directly above – the lack of regulatory authority, the ability to be sued, *etc.* – were found dispositive in *Patrickson* and indicative of the fact that the entity at issue was not an "organ" of a foreign state.[10] Instead, as in *Patrickson*, this Court finds that Powerex constitutes and "independent commercial enterprise, heavily regulated, but acting to maximize profits rather than pursue public objectives." 251 F.3d at 808. As such, Powerex cannot be characterized as an "organ" of the Province under § 1603(b)(2) of the FSIA.[11]

(b) The "Ownership" Test Under the FSIA

In the alternative, Defendants contend that Powerex should be considered an agency or instrumentality of British Columbia under the "ownership" test of § 1603(b)(2). Ninth Circuit case law, however, unequivocally forecloses that contention. In *Gates*, the Ninth Circuit held that under the FSIA, a corporation owned by an instrumentality of a foreign government is not itself an instrumentality of that government. 54 F.3d at 1462. An instrumentality includes any entity "a majority of whose shares or other ownership interest is owned by a foreign state or political

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[10] Cross-Defendant Powerex also argues that because the Financial Administration Act allows the Province to "regulate Powerex's planning, management, and reporting of capital expenditures, and examine Powerex's financial and accounting operations," Powerex is an "organ" of the Province. The Ninth Circuit's decision in *Patrickson*, however, refutes this contention as well. *See* 251 F.3d at 808 (stating that granting such authority "directly to the Israeli government . . . is not considerably different from the control a majority shareholder would enjoy under American law").

[11] Cross-Defendant Powerex makes much of the fact that pursuant to the "Entitlement Assignment Agreement," the Province assigned all of its rights, title, and interest in the Canadian Entitlement under the Columbia River Treaty to Powerex. Powerex asserts that the assignment is representative of Powerex's status as an "agency or instrumentality" of a foreign state. The assignment, however, specifically provides "Powerex will not be or be construed as *the agent* of the Province." (Ct. Rec. 89) (emphasis added). Thus, the language of the assignment itself dispels Powerex's argument.

subdivision thereof." 28 U.S.C. § 1603(b)(2). The court in *Gates* read that provision as limiting an instrumentality to the first tier of ownership: those entities owned directly by the foreign state itself or by a political subdivision. *Id.* It held that a corporation wholly-owned by an instrumentality of a foreign government is not a foreign instrumentality under FSIA. *Id.* at 1463.

In *Patrickson*, the Ninth Circuit reaffirmed the rule announced in *Gates*. *See* 251 F.3d at 806-07. In so doing, the court held that two subsidiaries of a parent company owned by Israel were never owned directly by the Israeli government, and, as such, *Gates* quashed their claim that they were instrumentalities through stock ownership. *Id.*

Thus, under this express Ninth Circuit law, it is clear that while BC Hydro, a fist-tier government-owned corporation, qualifies as an "agency or instrumentality," Powerex, a second-tier government-owned corporation, does not. Because they must, Defendants do their best to maneuver around this binding case law, but to no avail.

First, Defendants note that other circuits have held the opposite. *See, e.g., Delgado v. Shell Corp.*, 231 F.3d 165, 176 (5th Cir. 2000) (holding wholly-owned subsidiaries qualify as agencies or instrumentalities of foreign states under FSIA). Clearly, this argument is not compelling, as Ninth Circuit case law is binding on this Court and Fifth Circuit case law is not. As the court noted in *Patrickson*, "none of this matters, because *Gates* decided this question, and we are bound by its authority."

Second, Defendants note that the Supreme Court has granted *certiorari* in *Patrickson* on this specific issue and, thus, this Court should delay any decision as to whether Powerex constitutes an "agency or instrumentality." *Patrickson*, however, remains binding authority until overturned.[12] *See Hasbrouck v. Texaco, Inc.*, 663 F.2d 930, 932

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[12] Cross-Defendant Powerex forwards a rather creative, but ultimately unpersuasive, argument in an attempt to qualify Powerex as an "agent or instrumentality" under the Ninth Circuit's fist-tier ownership

(9th Cir. 1981) (holding district courts are bound by law of their home circuit; they are not to resolve splits between circuits no matter how egregiously in error they may feel their own circuit to be).

B. Jurisdiction Over the United States Cross-Defendants

Plaintiffs claim that the Court lacks subject matter jurisdiction over the cross-claims filed against BPA and the WAPA because the cross-claims fall within the exclusive jurisdiction of the federal courts. Plaintiffs argue that since those claims were originally filed in state court, and the state court did not have jurisdiction in the first instance, the doctrine of derivative jurisdiction deprives this Court of jurisdiction. Defendants contend that the derivative jurisdiction doctrine is of no import because the federal agencies waived their sovereign immunity by agreeing to the "ISO" and "PX" tariffs, the terms of which purportedly made the agencies amenable to service in the state court. Moreover, Defendants argue that even if the state court could not acquire jurisdiction over the cross-complaints, the Ninth Circuit has rejected the doctrine of derivative jurisdiction. The United States responds by arguing that BPA and WAPA did not, and, indeed, could not, waive the government's sovereign immunity, and are in agreement with the Plaintiffs that the doctrine of derivative jurisdiction remains viable in the Ninth Circuit. For the reasons discussed below, the Court finds that it lacks

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test. Powerex asserts that because BC Hydro was formed under the Hydro and Power Authority Act in British Columbia, and acts as the Hydro and Power Authority for the Province, it is, in essence, directly akin to status as the Province. As the argument goes, since BC Hydro owns Powerex, and BC Hydro *is* the Province, Powerex is owned directly by the Province, thereby satisfying the Ninth Circuit's first-tier ownership test. This argument ignores one salient fact, however: the Hydro and Power Authority Act created BC Hydro as a Provincial Crown Corporation, stating that "for all its purposes [BC Hydro is] *an agent* of the government and its powers may be exercised only as *an agent* of the government." R.S.B.C. 1996, Ch. 212, § 3(1) (emphasis added).

jurisdiction over the claims asserted against the United States.

(1) Waiver of Sovereign Immunity

If the United States did, indeed, waive its sovereign immunity and agree to service on the cross-claims in state court, the issue of whether the state court otherwise can exercise subject matter jurisdiction is moot. Thus, the Court must address the waiver argument first.

The wholesale electricity markets in California are operated by the California Power Exchange ("PX") and the California Independent System Operator ("ISO"). Prices for power delivered during a given hour of a particular day are governed by PX and ISO tariffs approved by the FERC. Thus, it is the FERC that ultimately authorizes the tariffs. By participating in the PX and ISO market auctions, BPA and WAPA agreed to the tariffs. Both the PX and ISO tariffs contained a provision stating:

> Market Participants irrevocably consent that any legal action or proceeding arising or relating to this ISO Tariff to which the ISO ADR Procedures do not apply, shall be brought in any court of the State of California or any federal court of the United States of America located in the State of California. *Market Participants irrevocably waive any objection that they may have now or in the future to said courts in the State of California* as the proper and exclusive forum for any legal action or proceeding under or related to this . . . Tariff.

(Ct. Rec. 81.) (emphasis added).

Defendants claim that this clause equates to a valid waiver of the United States sovereign immunity. In support of their argument, Defendants point to case law that holds that FERC-approved tariffs constitute "federal law." *See, e.g., In Re California Natural Gas and Electricity Antitrust Litigation*, 170 F. Supp. 2d 1052, 1060 n.11 (D. Nev. 2001) ("A federal tariff has the force and effect of federal law."). Thus, Defendants suggest that the tariffs represent

an unequivocal expression on the part of the United States to waive its immunity.

This argument, however, fails to address the threshold issue – does FERC have the authority to waive the sovereign immunity of the BPA and WAPA? Since the tariffs are subject to FERC approval and are only valid in that regard, FERC essentially imposed the requirement that BPA and WAPA agree to waive their immunity via the clause included in the tariffs. Yet, Defendants have not pointed to any authority suggesting that FERC indeed has the power to waive the sovereign immunity of another independent federal agency in this manner.

It is a fundamental principle of federal law that only Congress, not a federal agency or officer, can waive sovereign immunity. *See Minnesota v. United States*, 305 U.S. 382, 388-89 (1939) ("[I]t rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought. . . . [w]here jurisdiction has not been conferred by Congress, no officer of the United States has the power to give any court jurisdiction of a suit against the United States."). Moreover, any waiver of sovereign immunity must be unequivocally expressed in a federal statute and will not be implied. *See Lane v. Pena*, 518 U.S. 187, 191 (1996). Defendants do not cite, and this Court was unable to locate, any congressionally-enacted statute that imparts FERC with the power to waive the sovereign immunity of other federal agencies via provisions included in FERC-approved tariffs. As a result, the Court holds that no valid waiver occurred and BPA and WAPA are immune from suit in the state court.[13]

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[13] Defendants also claim that because Congress supposedly granted BPA broad powers to operate as a commercial enterprise, Congress in turn waived BPA's sovereign immunity concerning suits involving BPA's commercial activities. Defendants cite *Loeffler v. Frank*, 486 U.S. 549 (1988) in support of their position. There, the Supreme Court stated, "by launching 'the Postal Service into the commercial world,' *and including a sue-and-be-sued clause in its charter*, Congress has cast off the Service's 'cloak of sovereignty' and given it the status of a

(2) Derivative Jurisdiction Doctrine

The doctrine of derivative jurisdiction states "[w]hen an action is removed from state court by the United States pursuant to 28 U.S.C. § 1442(a)(1), the jurisdiction of the district court upon removal is derivative of the state court's." *In Re Elko County Grand Jury*, 109 F.3d 554, 555 (9th Cir. 1997). This means that where the state court lacked jurisdiction over the claim giving rise to the removal, the "federal court acquires none, although in a like suit originally brought in federal court it would have had jurisdiction." *Minnesota*, 305 U.S. at 388.

As an initial matter, it is important to note that here, the California state court lacked jurisdiction over the cross-claims filed by Defendants against Cross-Defendant the United States. Defendants' cross-claims against the United States arise under the Federal Tort Claims Act ("FTCA"). *See United Air Lines, Inc. v. Wiener*, 335 F.2d 379, 401 (9th Cir. 1964) ("The right to indemnity, where it exists, may be enforced against the United States under the Tort Claims Act."). The FTCA grants the federal courts "exclusive jurisdiction of civil actions on claims against the United States for money damages" arising under state law. 28 U.S.C. § 1346(b). Because federal courts have exclusive jurisdiction over indemnity and other claims against the United States, Defendants' cross-claims against the United States were improperly filed in state court, which lacked jurisdiction to hear them.

Moreover, the United States is immune from suit under the particular cross-claims brought by Defendants. Plaintiffs' Master Complaint alleges violations of California anti-trust laws (Cartwright Act) and California's Unfair

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private enterprise." *Id.* at 555 (emphasis added). *Loeffler* does not support the proposition Defendants assert that it does; it was the fact that Congress included a "sue-and-be-sued" clause in the Postal Service's charter that waived its immunity, not the simple fact that it operated as a commercial enterprise. Defendants do not point to a similar "sue-and-be-sued" clause in BPA's chartering Act and, as such, BPA could not otherwise waive its sovereign immunity.

Competition Law ("UCL"). Defendants seek indemnity from the United States if they are held liable for violating these laws. The United States, however, cannot be liable on Defendant's indemnity claims unless they could also be liable on Plaintiffs' underlying claims. *See Western Steamship Lines, Inc. v. San Pedro Peninsula Hosp.*, 876 P.2d 1062, 1070 (Cal. App. 1994).

As to the antitrust claims, "antitrust laws do not apply to the federal government." *See Department of Water & Power v. Bonneville Power Admin.*, 759 F.2d 684, 693 n.12 (9th Cir. 1985). The fact that the cross-claims are premised on the California antitrust law does not alter the result, because "[t]he analysis under [the Cartwright Act] mirrors the analysis under federal law because the Cartwright Act . . . was modeled after the Sherman Act." *County of Tuolumne v. Snora Comm. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001). Hence, as BPA and WAPA are immune under the Sherman Act, they are likewise immune under the Cartwright Act. *Cf. Saratoga Sav. & Loan Ass'n v. Federal Home Loan Bank*, 724 F. Supp. 683, 688-89 (N.D. Cal. 1989) (dismissing Cartwright Act claim against federal agency, explaining that "California courts have uniformly recognized that governmental entities are not 'persons' within the meaning of the [Act] and that such entities are, therefore, not subject to liability under [it].").

Likewise, the United States cannot be sued under the UCL. Section 17203 of the law allows suit against any person. *See* Cal. Bus. & Prof. § 17203. Section 17201 defines "persons" as meaning "natural persons, corporations, firms, partnerships, joint stock companies, associations, and other organizations of persons." *Id.* at § 17201. California courts have determined that the State, its subdivisions or agencies, and other governmental entities are not "persons" subject to suit under the UCL. *See, e.g., Trinkle v. California State Lottery*, 71 Cal. App. 4th 1198, 1203-04 (1999) (holding that as state agency, California State Lottery is not "person" amendable to suit under UCL). It fol-

lows that the United States is immune from suit under the UCL as well.

Having established that the California state court does not have jurisdiction over the cross-claims asserted by Defendants, the only remaining question is whether the derivative jurisdiction doctrine bars this Court from asserting jurisdiction over the cross-claims against the United States upon removal. Since Congress enacted 28 U.S.C. § 1441(e), the vitality of the doctrine has come into question. Section 1441(e) provides that "[t]he court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction." 28 U.S.C. § 1441(e). This section effectively invalidates the applicability of the derivative jurisdiction doctrine from removals under § 1441.

The United States removed the cross-claims under § 1442, however. (Ct. Rec. 3). A clear split in authority exists among the federal circuits as to whether 1441(e) abolishes the derivative jurisdiction doctrine as it applies to § 1442. *See Smith v. Cromer*, 159 F.3d 875, 879 (4th Cir. 1998) (doctrine still valid); *Edwards v. United States Dep't of Justice*, 43 F.3d 312, 315 (7th Cir. 1994) (doctrine still valid); *State of North Dakota v. Fredericks*, 940 F.2d 333, 336 (8th Cir. 1991) (doctrine invalid); *Federal Nat'l Mortgage Ass'n v. LeCrone*, 868 F.2d 190, 192 n.4 (6th Cir. 1989), *cert denied*, 493 U.S. 938 (1989) (doctrine invalid). For the purposes here, however, it is important to note that in the Ninth Circuit the doctrine remains vital in regard to § 1442 removals.

In a case decided after 28 U.S.C. § 1441(e) went into effect, the Ninth Circuit held that "because this case was removed from state court pursuant to § 1442, our jurisdiction is derivative of the state court's jurisdiction." *In Re Elko County*, 109 F.3d at 555. The court applied the doctrine of derivative jurisdiction to hold that "because we conclude that the state court lacked jurisdiction to issue the subpoena [against a federal employee], we must dis-

miss the case on that ground." *Id.* *In Re Elko County* constitutes the Ninth Circuit's most recent statement on the derivative jurisdiction doctrine, and indicates that the Ninth Circuit holds the view that Congress only abolished derivative jurisdiction as to removals under § 1441, and not § 1442.

Defendants contend that twice the Ninth Circuit has held, in cases prior to *In Re Elko County*, that "the Section 1441(e) repeal of derivative jurisdiction extends to Section 1442 removals," citing *Guidry v. Durkin*, 834 F.2d 1465, 1468 n.4 (9th Cir. 1987) and *Beeman v. Olson*, 828 F.2d 620, 621 (9th Cir. 1987). Defendants mischaracterize both *Guidry* and *Beeman*. In both cases, the court merely noted, without analysis, the recent addition of section 1441(e). Both openly acknowledged that § 1441(e) had no application to the holdings of those cases, and as such, the statements made in each constituted no more than *dicta*. As a result, the *In Re Elko County* decision, holding that the derivative jurisdiction doctrine remains viable in regard to removals made under § 1442, constitutes the governing law in the Ninth Circuit. Given this conclusion, the Court finds that under the derivative jurisdiction doctrine, it does not have jurisdiction over the cross-claims filed against the United States because the state court lacked jurisdiction to hear them in the first place.

Accordingly, **IT IS HEREBY ORDERED** Plaintiffs' Motion to Remand and Motion to Strike and/or Sever Cross-Complaints (Ct. Rec. 58) is **GRANTED**.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel.

DATED this 13th day of December, 2002.

/s/ ROBERT H. WHALEY
ROBERT H. WHALEY
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-57200, 02-57202, 02-57210, 03-55118, 03-55131, 03-55176, 03-55241, 03-55249, 03-55266, 03-55319, 03-55322 & 03-55349

(D.C. No. CV-02-01001-RHW)
Southern District of California, San Diego

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.,
Plaintiffs,

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Intervenor,

v.

NRG ENERGY INC., ET AL.,
Defendants,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Cross-claimants-Appellants,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-defendants-Appellees.

[Filed: Mar. 3, 2005]

ORDER

Before: SCHROEDER, Chief Judge, CANBY, and TALLMAN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Coordination Proceeding Special Title (Rule 1550(b))

WHOLESALE ELECTRICITY ANTITRUST CASES I & II

Nos. CV 02-0990-JM(LAB)
CV 02-1000-L(JAH)
CV 02-1001-B(POR)

This Document relates to:

Reliant Energy Services, Inc., et al. v. Arizona Electric Power Cooperative, Inc., et al.

Duke Energy Trading and Marketing, LLC, et al. v. Arizona Public Service Company, et al.

Reliant Energy Services, Inc., et al. v. Arizona Electric Power Cooperative, Inc., et al.

DECLARATION OF KENNETH G. PETERSON

I, Kenneth G. Peterson, declare as follows:

1. I have personal knowledge of the facts stated in this declaration and, if called as a witness, I could and would competently testify to all of the facts stated herein.

2. I am trained as a resource economist and hold a masters degree in economics. Prior to joining Powerex, I was employed for 14 years with the British Columbia Hydro and Power Authority ("BC Hydro"). During my career at BC Hydro, I was responsible for various aspects of resource planning and, in that capacity, developed an intimate knowledge of BC Hydro's generating resources, the evolution of domestic demand for electricity within BC Hydro's service area in British Columbia, and the potential for the export of electricity to interconnected jurisdictions, particularly in the United States. I had personal

responsibility for overseeing the preparation of both resource plans and demand forecasts during my tenure at BC Hydro.

3. BC Hydro is a Crown corporation, incorporated in 1964 pursuant to the British Columbia Hydro and Power Authority Act. BC Hydro is owned in its entirety by Her Majesty the Queen in Right of the Province of British Columbia, by which name the Province of British Columbia (the "Province") is formally known. Dividends from the operations of BC Hydro are payable only to the Province.

4. The Lieutenant Governor in Council (the Executive Council of the Province) appoints BC Hydro's Board of Directors. A true copy of Orders in Council Nos. 751/2001, dated August 9, 2001, and 847/2001, dated September 25, 2001, appointing BC Hydro's Board of Directors, are attached hereto as Exhibit A. To my knowledge, no subsequent Orders in Council have been passed amending, rescinding, or superseding the above-described Orders in Council.

5. BC Hydro's corporate objective is to support the development of the Province of British Columbia through the efficient supply of electricity. On behalf of the Province, BC Hydro operates an electric utility involved in the generation, transmission, and distribution of electricity.

6. All substantive powers of BC Hydro are subject to, and can only be exercised with, the approval of the Lieutenant Governor in Council or the Minister responsible for BC Hydro.

7. BC Hydro sells all of its surplus electricity to Powerex, and all of those sales take place at the Provincial border. BC Hydro does not, and has not, sold power at points of delivery in the United States. BC Hydro has never participated in the bidding process established by the CalPX and ISO.

8. Powerex is an entity created by BC Hydro pursuant to its authority under the British Columbia Hydro and Power Authority Act. Powerex maintains two rate sched-

ules on file with FERC under which it sells power generated by BC Hydro at wholesale in United States interstate commerce pursuant to market-based rate authority granted by FERC on September 24, 1997.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this Declaration was executed this 9th day of August 2002, at Belle Fourche, South Dakota.

/s/ Kenneth G. Peterson
KENNETH G. PETERSON

[Exhibit omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Coordination Proceeding Special Title (Rule 1550(b))

Nos. CV 02-0990-JM(LAB)
CV 02-1000-L(JAH)
CV 02-1001-B(POR)

WHOLESALE ELECTRICITY ANTITRUST CASES I & II

This Document relates To:

Reliant Energy Services, Inc., et al. v. Arizona Electric Power Cooperative, Inc., et al.

Duke Energy Trading and Marketing, LLC, et al. v. Arizona Public Service Company, et al.

Reliant Energy Services, Inc., et al. v. Arizona Electric Power Cooperative, Inc., et al.

DECLARATION OF KENNETH G. PETERSON

I, Kenneth G. Peterson, declare as follows:

1. I have personal knowledge of the facts contained in this Declaration, except for those matters stated on information and belief, as to which I believe them to be true. If called as a witness, I could and would competently testify to all of the facts stated herein.

2. I have held the position of President and Chief Executive Officer of Powerex Corporation ("Powerex") since December 1, 1994.

3. I am trained as a resource economist and hold a masters degree in economics. Prior to joining Powerex, I was employed for 14 years with the British Columbia Hydro and Power Authority ("BC Hydro"). During my career at BC Hydro, I was responsible for various aspects of resource planning and, in that capacity, developed an inti-

mate knowledge of BC Hydro's generating resources, the evolution of domestic demand for electricity within BC Hydro's service area in British Columbia, and the potential for the export of electricity to interconnected jurisdictions, particularly in the United States. I had personal responsibility for overseeing the preparation of both resource plans and demand forecasts during my tenure at BC Hydro. When I began my career at BC Hydro, the corporation was in the latter stages of a very significant expansion of its generating capacity through the construction of major hydroelectric facilities in British Columbia. My understanding of the genesis of that construction program and its subsequent evolution is set out in the following paragraphs.

4. In 1962, the Provincial Government passed the British Columbia Hydro and Power Authority Act to establish a vehicle in which to hold assets it had acquired and to promote major hydroelectric development involving the construction of significant storage dams and generating capacity on the Peace and Columbia River systems (the "Two River Policy"). The Act was subject to litigation and ultimately declared ultra vires by the British Columbia Supreme Court in 1963. In 1964 the Provincial Government passed another British Columbia Hydro and Power Authority Act, which created the Provincial Crown Corporation known today as BC Hydro.

5. Once created, BC Hydro implemented the Two River Policy. Specifically, it began planning for the development of the W.A.C. Bennett Dam to create the Williston Reservoir on the Peace River. The Dam was completed in 1967. Since 1968, BC Hydro has further developed the hydroelectric potential of the Peace River with the installation of the Peace Canyon Dam and other power-related facilities.

6. In connection with the Two River Policy and its development of the Columbia River system, BC Hydro joined the Provincial Government and the Canadian Government in negotiations with the United States between

1962 and 1964 to develop a Protocol to the Columbia River Treaty ("Treaty").

7. The formal documents that comprise the arrangements between Canada and the United States with respect to the Treaty are compiled in a book issued by the Canadian Departments of External Affairs and Northern Affairs and National Resources and published by the Queen's Printer and Controller of Stationery in February 1964. In April 1964, the Department of External Affairs issued a further volume explaining additional aspects of the process that led to the finalization of the Treaty and the Protocol. My review of these documents, together with my involvement with the Treaty in the context of my responsibilities at BC Hydro and later at Powerex, has informed my understanding of these historical events.

8. Attached as Exhibit A hereto is a true copy of the following pages from the book described in Paragraph 8: 58-81 (Columbia River Treaty); 82-90 (the formal press release issued by the Prime Minister of Canada on January 17, 1961, immediately after signing the Treaty, explaining its origin and effect); 100-106 (Canada-British Columbia Agreement dated July 8, 1963); 107-109 (Canada-British Columbia Agreement dated January 13, 1964); 110-114 (exchange of Notes and Protocol regarding the Columbia River Treaty); 115-121 (exchange of Notes and Attachment Relating to Terms of Sale).

9. The Treaty required Canada to construct storage facilities in Canada to control the flow of the Columbia River in a way that would enable the United States to generate more power at its existing facilities on the Columbia River (the "Downstream Benefits"), and entitled Canada to receive half of the Downstream Benefits over the 60-year life of the Treaty (the "Canadian Entitlement"). In 1963, the British Columbia Provincial Government negotiated an agreement with Canada that provided for British Columbia to directly receive the Downstream Benefits. This Agreement is found at pages 100-106 of Exhibit A.

10. In 1964, the Province, Canada, and the United States agreed to a Protocol for the implementation of the Treaty. The Protocol is found at pages 110-114 of Exhibit A. In two separate documents, it was agreed that British Columbia would receive an upfront payment in place of the first 30 years of the Canadian Entitlement. These two documents are found at pages 107-109 and 115-121 of Exhibit A.

11. In October 1964 BC Hydro prepared a booklet that consolidated for convenient reference a number of documents relating to the Treaty. Attached as Exhibit B hereto is a true copy of the following pages from the book described in Paragraph 11: 1; 39-45 (Canadian Entitlement Purchase Agreement); 47 (Designation of Canadian Entity); and 49-54 (Exchange of Notes).

12. In September 1964, Canada designated BC Hydro as the Canadian Entity under the Treaty. This Designation is found at page 47 of Exhibit B.

13. BC Hydro played a key role, through its then Chairman Hugh Keenlyside, in the negotiations that produced these important international and interprovincial agreements. As a result, BC Hydro was responsible for construction of the reservoir facilities on the Columbia River to fulfill Canada's obligations under the Treaty and has been responsible ever since for the ongoing implementation and administration of the Treaty. The arrangements made for the initial disposal are found in the Canadian Entitlement Purchase Agreement (the "CEPA") between BC Hydro and Columbia Storage Power Exchange, a non-profit corporation organized under the laws of the State of Washington. Mr. Keenlyside signed this document on behalf of BC Hydro and it was approved by an Exchange of Notes dated September 16, 1964, between Canada and the United States. True copies of the CEPA and the Exchange of Notes are found at pages 39-45 and 49-54 of Exhibit B.

14. During the negotiations related to the Columbia River Treaty, BC Hydro continued its parallel development of the Peace River pursuant to the Two River Policy.

15. Construction of the facilities contemplated by the Two River Policy were completed in 1984 with the completion of the Revelstoke Dam on the Columbia River.

16. During the 1980s, BC Hydro was an active seller of power to the United States entities, primarily the Bonneville Power Administration ("Bonneville"), with such sales taking place at the international border.

17. In the late 1980's, the Provincial Government overhauled the legislation governing the energy sector in British Columbia. The Provincial Government created Powerex as an export agency for the purpose of marketing power to United States entities. The Provincial Government wished to ensure that BC Hydro's surplus power was marketed in a manner that maximized the benefits to all British Columbians. Additionally, the Provincial Government wished to promote the development of electricity produced by independent power producers for sales to the United States market.

18. In December 1988, BC Hydro – acting as the agent of the British Columbia Provincial Government under § 3(1) of the Hydro Act – incorporated Powerex under the Company Act of British Columbia as a wholly owned subsidiary of BC Hydro to serve the vital role of marketing the Province's surplus electric power. Powerex was originally incorporated as the British Columbia Power Export Corporation on December 13, 1988. The company changed its name to British Columbia Power Exchange Corporation on February 15, 1991, and then changed its name again to Powerex Corp. on September 6, 2000. True and correct copies of the Articles of Incorporation and Certificates changing the name of the company are attached hereto as Exhibit C.

19. Following its incorporation in 1988, Powerex assumed its responsibility for marketing surplus power from

the BC Hydro system. BC Hydro delivered surplus electricity to Powerex at the British Columbia border and Powerex, in turn, sold it to entities from the United States and Alberta at wholesale. Powerex continues to perform this function within this structure to the present day.

20. Since its incorporation, Powerex has also been called upon to serve some specific policy objectives set for it by the Provincial Government. For instance, in the early 1990's the Provincial Government approved Powerex as the appropriate vehicle to create a power exchange operation ("PEO") in British Columbia. The Provincial Government desired to promote a domestic independent power production industry by creating an efficient market for the private power. The PEO was approved as operational as of September 1993. The PEO contemplated Powerex making an auction market for the trading of electricity. The objectives for Powerex were set out in a document prepared by Powerex entitled "Opportunities in the Short-Term Electricity Market," which formed the basis for a presentation to stakeholders in early 1991 as part of the application process associated with the approval of the PEO. True copies of the relevant portions of this document are attached hereto as Exhibit D.

21. The PEO was part of the means by which Powerex was to meet the objectives of the Province. The PEO remained in place for a number of years, but did not fulfill expectations because of lack of interest from the generating sector. The PEO is no longer operational.

22. Powerex was directly involved with the realization of Provincial objectives in connection with the Columbia River Treaty commencing early in the 1990s. It was at that time that the Province began the process of determining how to receive or dispose of the Canadian Entitlement under the Treaty once their contracts for the sale of the Downstream Benefits began to expire in 1998. Under the Treaty, the United States would be obliged to return the Canadian Entitlement to Canada unless a resale could be negotiated and approved by both countries.

23. Commencing in early 1990, BC Hydro began discussions with the U.S. Army Corps of Engineers and Bonneville (collectively the U.S. Entity under the Treaty) to define the Canadian Entitlement. Discussions became more focused commencing in 1993 as representatives of the Province, BC Hydro, Bonneville, and the U.S. Army Corps of Engineers began meetings to address the issue.

24. Early on, the potential for resale of the Canadian Entitlement in the United States became a prominent part of the discussions. Mr. Ken Epp, then President of Powerex, was an early member of the negotiating team, along with the Deputy Minister of Energy, Petroleum Mines and Mineral Resources. Upon the retirement of Mr. Epp, I became President and CEO of Powerex. I was also a member of the Province's negotiating team. I remained in both capacities through the completion of the negotiating process that resulted in arrangements with the United States for the return and/or resale of the Canadian Entitlement effective April 1, 1999. The negotiation process with respect to the Canadian Entitlement took approximately seven years. While the negotiating team on the Canadian side varied from time to time, I was a part of it throughout the process. The final arrangements approved by both countries include a significant role for Powerex.

25. Pursuant to an Entitlement Assignment Agreement, the Province assigned all of its rights, title, and interests in the Entitlement to Powerex so that it can realize the maximum benefits of the surplus power for British Columbians. While the precise amount of the Canadian Entitlement is determined pursuant to very complex calculations, it is a very significant resource. A true copy of the Entitlement Assignment Agreement is attached hereto as Exhibit E.

26. In 1997, the Province passed the Power for Jobs Act ("Jobs Act"). The Jobs Act contemplates diverting portions of BC Hydro's surplus power or the Canadian Entitlement, which would otherwise be sold by Powerex to ex-

ternal markets, to British Columbia industry for the purpose of job creation. Pursuant to the Jobs Act, the Provincial Government was empowered to instruct either BC Hydro or Powerex to supply power to British Columbia industry on terms defined by the Provincial Government.

27. On behalf of Powerex, I have been involved in numerous negotiations between the Provincial Government and industrial undertakings contemplating locating facilities in British Columbia for which the price of power is a significant factor in making a location decision. Powerex was contemplated to play an important role in connection with the supply of power in each case. While those efforts have been unsuccessful, pursuant to the Jobs Act and at the direction of the Provincial Government, Powerex has supplied power on favorable terms to facilitate the expansion of some existing businesses in British Columbia.

28. On March 30, 1984, the Provincial Government entered into an agreement with the City of Seattle, Washington ("Seattle"), related to the Skagit River Treaty (the "Skagit Agreement"). Under the Skagit Agreement, Seattle agreed not to raise the High Ross Dam, which would have had the effect of flooding substantial areas of British Columbia. As compensation for the loss of the power benefits that would have been derived from the High Ross Dam, British Columbia agreed to deliver certain quantities of electricity to Seattle until 2066. A true copy of the Skagit Agreement is attached hereto as Exhibit F.

29. On December 3, 1985, the Province assigned certain of the Province's benefits and obligations under the Skagit Agreement to BC Hydro. A true copy of this document is attached hereto as Exhibit G. As a result of a 1996 Bonneville rate case, lengthy negotiations commenced between the Province, Seattle, and Bonneville regarding the transmission arrangements relating to the power provider under the Skagit River Treaty. Powerex took the lead role (on behalf of the Province) in negotiating a resolution of the issues among the parties. Effective February 1, 1999, BC Hydro entered into the "Agreement

for the Transmission of Skagit River Treaty Power between British Columbia Hydro and Power Authority and the City of Seattle" (the "Skagit Transmission Agreement"). A true copy of the Skagit Transmission Agreement is attached hereto as Exhibit H. Powerex executed a replacement power agreement with Bonneville, also effective February 1, 1999, under which Seattle was able to call upon Bonneville to deliver power to Seattle for the account of Powerex in the event Powerex was unable to deliver the Skagit River Treaty power pursuant to the Skagit Agreement. Additionally, Seattle and Bonneville executed a Point-to-Point Transmission Service Agreement ("Skagit PTP Agreement") for the necessary transmission capacity for the provision of the Skagit Treaty power. BC Hydro assigned its rights and obligations, and delegated its operating responsibilities under the Skagit Transmission Agreement and the Skagit PTP Agreement to Powerex, to the extent permitted by such agreements. A true copy of the BC Hydro – Powerex Assignment Agreement is attached hereto as Exhibit I.

30. Columbia Power Corporation ("CPC") and CBT Power Corp. ("CBT") were established by Columbia Basin Trust, a corporation established by Columbia Basin Trust Act. CPC and CBT were responsible for upgrading the Brilliant generating facilities. CPC/CBT's upgrade was secured by a power purchase agreement with West Kootenay Power (now UtiliCorp Networks Canada, Inc). Powerex entered into a Backstop Agreement with CPC/CBT to facilitate the Provincial Government's desire that CPC/CBT develop the Brilliant Dam upgrade. Under the Backstop Agreement, Powerex agreed to purchase electricity produced at the Brilliant facilities in the event West Kootenay Power defaults on its purchase obligation due to insolvency. A true copy of the Backstop Agreement is attached hereto as Exhibit J.

31. Powerex performs its role as the exclusive exporter of BC Hydro's surplus under my direction. I report in the normal course to my Board of Directors, but, on a day-to-

day basis, my management team and I are solely responsible for determining the manner in which Powerex meets its mandate to maximize the value of its export activities. Over the course of the 1990s, it became apparent that Powerex could better achieve its objectives by expanding its activities into acquiring and reselling power generated by parties other than BC Hydro. Again, under my direction, Powerex has expanded considerably in this area and has become an active trader in wholesale markets throughout North America. This has occurred under my direction and it is my belief that it has assisted British Columbia in achieving its objective of obtaining maximum value for the surplus power generated from British Columbia to the benefit of British Columbia taxpayers and ratepayers.

32. BC Hydro's Board of Directors appoints Powerex's Board of Directors. A number of Powerex's current executives previously worked at BC Hydro.

33. Powerex does not pay Canadian federal and Provincial income tax.

34. BC Hydro is a Crown corporation, incorporated in 1964 pursuant to the British Columbia Hydro and Power Authority Act. BC Hydro is owned in its entirety by Her Majesty the Queen in Right of the Province of British Columbia, by which name the Province of British Columbia (the "Province") is formally known. Dividends from the operations of BC Hydro are payable only to the Province.

35. The Lieutenant Governor in Council (the Executive Council of the Province) appoints BC Hydro's Board of Directors. A true copy of Orders in Council Nos. 751/2001, dated August 9, 2001, and 847/2001, dated September 25, 2001, appointing BC Hydro's Board of Directors, are attached hereto as Exhibit K. To my knowledge, no subsequent Orders in Council have been passed amending, rescinding, or superseding the above-described Orders in Council. BC Hydro, as the sole shareholder of Powerex, is authorized to appoint Powerex's Board of Directors. It does so by issuing a resolution naming the Board mem-

bers. Outside members of Powerex's current Board of Directors were subject to concurrence by the Office of the Premier. A true copy of the Extract from the Minutes of a Meeting of the Board of Directors of British Columbia Hydro and Power Authority held on October 18, 2001, is attached hereto as Exhibit L.

36. All substantive powers of BC Hydro are subject to, and can only be exercised with, the approval of the Lieutenant Governor in Council or the Minister responsible for BC Hydro.

37. BC Hydro's corporate objective is to support the development of the Province of British Columbia through the efficient supply of electricity. On behalf of the Province, BC Hydro operates an electric utility involved in the generation, transmission, and distribution of electricity.

38. BC Hydro maintains authority over Powerex through various arrangements, including a Risk Management Committee that oversees the financial exposure to which Powerex is subject. The Risk Management Committee is required to make periodic reports to the Provincial Government's Ministry of Finance.

39. BC Hydro also acts as the treasury for Powerex and facilitates the issuance of letters of credit in support of Powerex's commercial arrangements.

40. . BC Hydro's borrowings and other fiscal arrangements are provided through, and therefore are supported by, the Provincial Government. As a result, BC Hydro maintains a credit rating equal to that of the Province. Powerex's commercial arrangements, in turn, are frequently supported by a guarantee from BC Hydro, thus providing Powerex the benefit of both BC Hydro's credit rating as well as the implied backing of the Provincial Government.

41. BC Hydro sells all of its surplus electricity to Powerex, and all of those sales take place at the Provincial border. BC Hydro does not, and has not, sold power at points of delivery in the United States. BC Hydro has

never participated in the bidding process established by the CalPX and ISO.

42. Powerex maintains two rate schedules on file with FERC under which it sells power generated by BC Hydro at wholesale in United States interstate commerce pursuant to market-based rate authority granted by FERC on September 24, 1997.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this Declaration was executed this 9th day of August 2002, at Belle Fourche, South Dakota.

/s/ Kenneth G. Peterson
KENNETH G. PETERSON

[Exhibits omitted]

TREATY BETWEEN THE UNITED STATES OF AMERICA AND CANADA RELATING TO COOPERATIVE DEVELOPMENT OF THE WATER RESOURCES OF THE COLUMBIA RIVER BASIN

The Governments of the United States of America and Canada

Recognizing that their peoples have, for many generations, lived together and cooperated with one another in many aspects of their national enterprises for the greater wealth and happiness of their respective nations, and

Recognizing that the Columbia River basin, as a part of the territory of both countries, contains water resources that are capable of contributing greatly to the economic growth and strength and to the general welfare of the two nations, and

Being desirous of achieving the development of those resources in a manner that will make the largest contribution to the economic progress of both countries and to the welfare of their peoples of which those resources are capable, and

Recognizing that the greatest benefit to each country can be secured by cooperative measures for hydroelectric power generation and flood control, which will make possible other benefits as well,

Have agreed as follows:

ARTICLE I

Interpretation

(1) In the Treaty, the expression

(a) "average critical period load factor" means the average of the monthly load factors during the critical stream flow period;

(b) "base system" means the plants, works and facilities listed in the table in Annex B as enlarged from time to time by the installation of additional generating facilities, together with any other plants, works or

facilities which may be constructed on the main stem of the Columbia River in the United States of America;

(c) "Canadian storage" means the storage provided by Canada under Article II;

(d) "critical stream flow period" means the period, beginning with the initial release of stored water from full reservoir conditions and ending with the reservoirs empty, when the water available from reservoir releases plus the natural stream flow is capable of producing the least amount of hydroelectric power in meeting system load requirements;

(e) "consumptive use" means use of water for domestic, municipal, stock-water, irrigation, mining or industrial purposes but does not include use for the generation of hydroelectric power;

(f) "dam" means a structure to impound water, including facilities for controlling the release of the impounded water;

(g) "entity" means an entity designated by either the United States of America or Canada under Article XIV and includes its lawful successor;

(h) "International Joint Commission" means the Commission established under Article VII of the Boundary Waters Treaty, 1909, or any body designated by the United States of America and Canada to succeed to the functions of the Commission under this Treaty;

(i) "maintenance curtailment" means an interruption or curtailment which the entity responsible therefor considers necessary for purposes of repairs, replacements, installations of equipment, performance of other maintenance work, investigations and inspections;

(j) "monthly load factor" means the ratio of the average load for a month to the integrated maximum load over one hour during that month;

(k) "normal full pool elevation" means the elevation to which water is stored in a reservoir by deliberate impoundment every year, subject to the availability of sufficient flow;

(l) "ratification date" means the day on which the instruments of ratification of the Treaty are exchanged;

(m) "storage" means the space in a reservoir which is usable for impounding water for flood control or for regulating stream flows for hydroelectric power generation;

(n) "Treaty" means this Treaty and its Annexes A and B;

(o) "useful life" means the time between the date of commencement of operation of a dam or facility and the date of its permanent retirement from service by reason of obsolescence or wear and tear which occurs notwithstanding good maintenance practices.

(2) The exercise of any power, or the performance of any duty, under the Treaty does not preclude a subsequent exercise or performance of the power or duty.

ARTICLE II

Development by Canada

(1) Canada shall provide in the Columbia River basin in Canada 15,500,000 acre-feet of storage usable for improving the flow of the Columbia River.

(2) In order to provide this storage, which in the Treaty is referred to as the Canadian storage, Canada shall construct dams:

(a) on the Columbia River near Mica Creek, British Columbia, with approximately 7,000,000 acre-feet of storage;

(b) near the outlet of Arrow Lakes, British Columbia, with approximately 7,100,000 acre-feet of storage; and

(c) on one or more tributaries of the Kootenay River in British Columbia downstream from the Canada-United States of America boundary with storage equivalent in effect to approximately 1,400,000 acre-feet of storage near Duncan Lake, British Columbia.

(3) Canada shall commence construction of the dams as soon as possible after the ratification date.

ARTICLE III

Development by the United States of America Respecting Power

(1) The United States of America shall maintain and operate the hydroelectric facilities included in the base system and any additional hydroelectric facilities constructed on the main stem of the Columbia River in the United States of America in a manner that makes the most effective use of the improvement in stream flow resulting from operation of the Canadian storage for hydroelectric power generation in the United States of America power system.

(2) The obligation in paragraph (1) is discharged by reflecting in the determination of downstream power benefits to which Canada is entitled the assumption that the facilities referred to in paragraph (1) were maintained and operated in accordance therewith.

ARTICLE IV

Operation by Canada

(1) For the purpose of increasing hydroelectric power generation in the United States of America and Canada, Canada shall operate the Canadian storage in accordance with Annex A and pursuant to hydroelectric operating plans made thereunder. For the purposes of this obligation an operating plan if it is either the first operating plan or if in the view of either the United States of America or Canada it departs substantially from the immediately preceding operating plan must, in order to be effective, be confirmed

by an exchange of notes between the United States of America and Canada.

(2) For the purpose of flood control until the expiration of sixty years from the ratification date, Canada shall

(a) operate in accordance with Annex A and pursuant to flood control operating plans made thereunder

(i) 80,000 acre-feet of the Canadian storage described in Article II(2)(a),

(ii) 7,100,000 acre-feet of the Canadian storage described in Article II(2)(b),

(iii) 1,270,000 acre-feet of the Canadian storage described in Article II(2)(c),

provided that the Canadian entity may exchange flood control storage under subparagraph (ii) for flood control storage additional to that under subparagraph (i), at the location described in Article II(2)(a), if the entities agree that the exchange would provide the same effectiveness for control of floods on the Columbia River at the Dalles, Oregon;

(b) operate any additional storage in the Columbia River basin in Canada, when called upon by an entity designated by the United States of America for that purpose, within the limits of existing facilities and as the entity requires to meet flood control needs for the duration of the flood period for which the call is made.

(3) For the purpose of flood control after the expiration of sixty years from the ratification date, and for so long as the flows in the Columbia River in Canada continue to contribute to potential flood hazard in the United States of America, Canada shall, when called upon by an entity designated by the United States of America for that purpose, operate within the limits of existing facilities any storage in the Columbia River basin in Canada as the entity requires to meet flood control needs for the duration of the flood period for which the call is made.

(4) The return to Canada for hydroelectric operation and the compensation to Canada for flood control operation shall be as set out in Articles V and VI.

(5) Any water resource development, in addition to the Canadian storage, constructed in Canada after the ratification date shall not be operated in a way that adversely affects the stream flow control in the Columbia River within Canada so as to reduce the flood control and hydroelectric power benefits which the operation of the Canadian storage in accordance with the operating plans in force from time to time would otherwise produce.

(6) As soon as any Canadian storage becomes operable Canada shall commence operation thereof in accordance with this Article and in any event shall commence full operation of the Canadian storage described in Article II(2)(b) and Article II(2)(c) within five years of the ratification date and shall commence full operation of the balance of the Canadian storage within nine years of the ratification date.

ARTICLE V

Entitlement to Downstream Power Benefits

(1) Canada is entitled to one half the downstream power benefits determined under Article VII.

(2) The United States of America shall deliver to Canada at a point on the Canada-United States of America boundary near Oliver, British Columbia, or at such other place as the entities may agree upon, the downstream power benefits to which Canada is entitled, less

(a) transmission loss,

(b) the portion of the entitlement disposed of under Article VIII(1), and

(c) the energy component described in Article VIII(4).

(3) The entitlement of Canada to downstream power benefits begins for any portion of Canadian storage upon commencement of its operation in accordance with Annex A

and pursuant to a hydroelectric operating plan made thereunder.

ARTICLE VI

Payment for Flood Control

(1) For the flood control provided by Canada under Article IV(2)(a) the United States of America shall pay Canada in United States funds:

(a) 1,200,000 dollars upon the commencement of operation of the storage referred to in subparagraph (a)(i) thereof,

(b) 52,100,000 dollars upon the commencement of operation of the storage referred to in subparagraph (a)(ii) thereof, and

(c) 11,100,000 dollars upon the commencement of operation of the storage referred to in subparagraph (a)(iii) thereof.

(2) If full operation of any storage is not commenced within the time specified in Article IV, the amount set forth in paragraph (1) of this Article with respect to that storage shall be reduced as follows:

(a) under paragraph (1)(a), 4,500 dollars for each month beyond the required time,

(b) under paragraph (1)(b), 192,100 dollars for each month beyond the required time, and

(c) under paragraph (1)(c), 40,800 dollars for each month beyond the required time.

(3) For the flood control provided by Canada under Article IV(2)(b) the United States of America shall pay Canada in United States funds in respect only of each of the first four flood periods for which a call is made 1,875,000 dollars and shall deliver to Canada in respect of each and every call made, electric power equal to the hydroelectric power lost by Canada as a result of operating the storage to meet the flood control need for which the call was made, delivery to be made when the loss of hydroelectric power occurs.

(4) For each flood period for which flood control is provided by Canada under Article IV(3) the United States of America shall pay Canada in United States funds:

(a) the operating cost incurred by Canada in providing the flood control, and

(b) compensation for the economic loss to Canada arising directly from Canada foregoing alternative uses of the storage used to provide the flood control.

(5) Canada may elect to receive in electric power, the whole or any portion of the compensation under paragraph (4)(b) representing loss of hydroelectric power to Canada.

ARTICLE VII

Determination of Downstream Power Benefits

(1) The downstream power benefits shall be the difference in the hydroelectric power capable of being generated in the United States of America with and without the use of Canadian storage, determined in advance, and is referred to in the Treaty as the downstream power benefits.

(2) For the purpose of determining the downstream power benefits:

(a) the principles and procedures set out in Annex B shall be used and followed;

(b) the Canadian storage shall be considered as next added to 13,000,000 acre-feet of the usable storage listed in Column 4 of the table in Annex B;

(c) the hydroelectric facilities included in the base system shall be considered as being operated to make the most effective use for hydroelectric power generation of the improvement in stream flow resulting from operation of the Canadian storage.

(3) The downstream power benefits to which Canada is entitled shall be delivered as follows:

(a) dependable hydroelectric capacity as scheduled by the Canadian entity, and

(b) average annual usable hydroelectric energy in equal amounts each month, or in accordance with a modification agreed upon under paragraph (4).

(4) Modification of the obligation in paragraph (3)(b) may be agreed upon by the entities.

ARTICLE VIII

Disposal of Entitlement to Downstream Power Benefits

(1) With the authorization of the United States of America and Canada evidenced by exchange of notes, portions of the downstream power benefits to which Canada is entitled may be disposed of within the United States of America. The respective general conditions and limits within which the entities may arrange initial disposals shall be set out in an exchange of notes to be made as soon as possible after the ratification date.

(2) The entities may arrange and carry out exchanges of dependable hydroelectric capacity and average annual usable hydroelectric energy to which Canada is entitled for average annual usable hydroelectric energy and dependable hydroelectric capacity respectively.

(3) Energy to which Canada is entitled may not be used in the United States of America except in accordance with paragraphs (1) and (2).

(4) The bypassing at dams on the main stem of the Columbia River in the United States of America of an amount of water which could produce usable energy equal to the energy component of the downstream power benefits to which Canada is entitled but not delivered to Canada under Article V or disposed of in accordance with paragraphs (1) and (2) at the time the energy component was not so delivered or disposed of, is conclusive evidence that such energy component was not used in the United States of America and that the entitlement of Canada to such energy component is satisfied.

ARTICLE IX

Variation of Entitlement to Downstream Power Benefits

(1) If the United States of America considers with respect to any hydroelectric power project planned on the main stem of the Columbia River between Priest Rapids Dam and McNary Dam that the increase in entitlement of Canada to downstream power benefits resulting from the operation of the project would produce a result which would not justify the United States of America in incurring the costs of construction and operation of the project, the United States of America and Canada at the request of the United States of America shall consider modification of the increase in entitlement.

(2) An agreement reached for the purposes of this Article shall be evidenced by an exchange of notes.

ARTICLE X

East-West Standby Transmission

(1) The United States of America shall provide in accordance with good engineering practice east-west standby transmission service adequate to safeguard the transmission from Oliver, British Columbia, to Vancouver, British Columbia, of the downstream power benefits to which Canada is entitled and to improve system stability of the east-west circuits in British Columbia.

(2) In consideration of the standby transmission service, Canada shall pay the United States of America in Canadian funds the equivalent of 1.50 United States dollars a year for each kilowatt of dependable hydroelectric capacity included in the downstream power benefits to which Canada is entitled.

(3) When a mutually satisfactory electrical coordination arrangement is entered into between the entities and confirmed by exchange of notes between the United States of America and Canada the obligation of Canada in paragraph (2) ceases.

ARTICLE XI

Use of Improved Stream Flow

(1) Improvement in stream flow in one country brought about by operation of storage constructed under the Treaty in the other country shall not be used directly or indirectly for hydroelectric power purposes except:

(a) in the case of use within the United States of America with the prior approval of the United States entity, and

(b) in the case of use within Canada with the prior approval of the authority in Canada having jurisdiction.

(2) The approval required by this Article shall not be given except upon such conditions, consistent with the Treaty, as the entity or authority considers appropriate.

ARTICLE XII

Kootenai River Development

(1) The United States of America for a period of five years from the ratification date, has the option to commence construction of a dam on the Kootenai River near Libby, Montana, to provide storage to meet flood control and other purposes in the United States of America. The storage reservoir of the dam shall not raise the level of the Kootenai River at the Canada-United States of America boundary above an elevation consistent with a normal full pool elevation at the dam of 2,459 feet, United States Coast and Geodetic Survey datum, 1929 General Adjustment, 1947 International Supplemental Adjustment.

(2) All benefits which occur in either country from the construction and operation of the storage accrue to the country in which the benefits occur.

(3) The United States of America shall exercise its option by written notice to Canada and shall submit with the notice a schedule of construction which shall include provision for commencement of construction, whether by way of

railroad relocation work or otherwise, within five years of the ratification date.

(4) If the United States of America exercises its option, Canada in consideration of the benefits accruing to it under paragraph (2) shall prepare and make available for flooding the land in Canada necessary for the storage reservoir of the dam within a period consistent with the construction schedule.

(5) If a variation in the operation of the storage is considered by Canada to be of advantage to it the United States of America shall, upon request, consult with Canada. If the United States of America determines that the variation would not be to its disadvantage it shall vary the operation accordingly.

(6) The operation of the storage by the United States of America shall be consistent with any order of approval which may be in force from time to time relating to the levels of Kootenay Lake made by the International Joint Commission under the Boundary Waters Treaty, 1909.

(7) Any obligation of Canada under this Article ceases if the United States of America, having exercised the option, does not commence construction of the dam in accordance with the construction schedule.

(8) If the United States of America exercises the option it shall commence full operation of the storage within seven years of the date fixed in the construction schedule for commencement of construction.

(9) If Canada considers that any portion of the land referred to in paragraph (4) is no longer needed for the purpose of this Article the United States of America and Canada, at the request of Canada, shall consider modification of the obligation of Canada in paragraph (4).

(10) If the Treaty is terminated before the end of the useful life of the dam Canada shall for the remainder of the useful life of the dam continue to make available for the storage reservoir of the dam any portion of the land made available under paragraph (4) that is not required by Can-

ada for purposes of diversion of the Kootenay River under Article XIII.

ARTICLE XIII

Diversions

(1) Except as provided in this Article neither the United States of America nor Canada shall, without the consent of the other evidenced by an exchange of notes, divert for any use, other than a consumptive use, any water from its natural channel in a way that alters the flow of any water as it crosses the Canada-United States of America boundary within the Columbia River basin.

(2) Canada has the right, after the expiration of twenty years from the ratification date, to divert not more than 1,500,000 acre-feet of water a year from the Kootenay River in the vicinity of Canal Flats, British Columbia, to the headwaters of the Columbia River, provided that the diversion does not reduce the flow of the Kootenay River immediately downstream from the point of diversion below the lesser of 200 cubic feet per second or the natural flow.

(3) Canada has the right, exercisable at any time during the period commencing sixty years after the ratification date and expiring one hundred years after the ratification date, to divert to the headwaters of the Columbia River any water which, in its natural channel, would flow in the Kootenay River across the Canada-United States of America boundary, provided that the diversion does not reduce the flow of the Kootenay River at the Canada-United States of America boundary near Newgate, British Columbia, below the lesser of 2,500 cubic feet per second or the natural flow.

(4) During the last twenty years of the period within which Canada may exercise the right to divert described in paragraph (3) the limitation on diversion is the lesser of 1,000 cubic feet per second or the natural flow.

(5) Canada has the right:

(a) if the United States of America does not exercise the option in Article XII(1), or

(b) if it is determined that the United States of America, having exercised the option, did not commence construction of the dam referred to in Article XII in accordance therewith or that the United States of America is in breach of the obligation in that Article to commence full operation of the storage,

to divert to the headwaters of the Columbia River any water which, in its natural channel, would flow in the Kootenay River across the Canada-United States of America boundary, provided that the diversion does not reduce the flow of the Kootenay River at the Canada-United States of America boundary near Newgate, British Columbia, below the lesser of 1,000 cubic feet per second or the natural flow.

(6) If a variation in the use of the water diverted under paragraph (2) is considered by the United States of America to be of advantage to it Canada shall, upon request, consult with the United States of America. If Canada determines that the variation would not be to its disadvantage it shall vary the use accordingly.

ARTICLE XIV

Arrangements for Implementation

(1) The United States of America and Canada shall each, as soon as possible after the ratification date, designate entities and when so designated the entities are empowered and charged with the duty to formulate and carry out the operating arrangements necessary to implement the Treaty. Either the United States of America or Canada may designate one or more entities. If more than one is designated the powers and duties conferred upon the entities by the Treaty shall be allocated among them in the designation.

(2) In addition to the powers and duties dealt with specifically elsewhere in the Treaty the powers and duties of the entities include:

(a) coordination of plans and exchange of information relating to facilities to be used in producing and obtaining the benefits contemplated by the Treaty,

(b) calculation of and arrangements for delivery of hydroelectric power to which Canada is entitled for providing flood control,

(c) calculation of the amounts payable to the United States of America for standby transmission services,

(d) consultation on requests for variations made pursuant to Articles XII(5) and XIII(6),

(e) the establishment and operation of a hydrometeorological system as required by Annex A,

(f) assisting and cooperating with the Permanent Engineering Board in the discharge of its functions,

(g) periodic calculation of accounts,

(h) preparation of the hydroelectric operating plans and the flood control operating plans for the Canadian storage together with determination of the downstream power benefits to which Canada is entitled,

(i) preparation of proposals to implement Article VIII and carrying out any disposal authorized or exchange provided for therein,

(j) making appropriate arrangements for delivery to Canada of the downstream power benefits to which Canada is entitled including such matters as load factors for delivery, times and points of delivery, and calculation of transmission loss,

(k) preparation and implementation of detailed operating plans that may produce results more advantageous to both countries than those that would arise from operation under the plans referred to in Annexes A and B.

(3) The entities are authorized to make maintenance curtailments. Except in case of emergency, the entity responsible for a maintenance curtailment shall give notice to the corresponding United States or Canadian entity of the curtailment, including the reason therefor and the probable duration thereof and shall both schedule the curtailment with a view to minimizing its impact and exercise due diligence to resume full operation.

(4) The United States of America and Canada may by an exchange of notes empower or charge the entities with any other matter coming within the scope of the Treaty.

ARTICLE XV

Permanent Engineering Board

(1) A Permanent Engineering Board is established consisting of four members, two to be appointed by Canada and two by the United States of America. The initial appointments shall be made within three months of the ratification date.

(2) The Permanent Engineering Board shall:

(a) assemble records of the flows of the Columbia River and the Kootenay River at the Canada-United States of America boundary;

(b) report to the United States of America and Canada whenever there is substantial deviation from the hydroelectric and flood control operating plans and if appropriate include in the report recommendations for remedial action and compensatory adjustments;

(c) assist in reconciling differences concerning technical or operational matters that may arise between the entities;

(d) make periodic inspections and require reports as necessary from the entities with a view to ensuring that the objectives of the Treaty are being met;

(e) make reports to the United States of America and Canada at least once a year of the results being achieved under the Treaty and make special reports concerning any matter which it considers should be brought to their attention;

(f) investigate and report with respect to any other matter coming within the scope of the Treaty at the request of either the United States of America or Canada.

(3) Reports of the Permanent Engineering Board made in the course of the performance of its functions under this Article shall be *prima facie* evidence of the facts therein contained and shall be accepted unless rebutted by other evidence.

(4) The Permanent Engineering Board shall comply with directions, relating to its administration and procedures, agreed upon by the United States of America and Canada as evidenced by an exchange of notes.

ARTICLE XVI

Settlement of Differences

(1) Differences arising under the Treaty which the United States of America and Canada cannot resolve may be referred by either to the International Joint Commission for decision.

(2) If the International Joint Commission does not render a decision within three months of the referral or within such other period as may be agreed upon by the United States of America and Canada, either may then submit the difference to arbitration by written notice to the other.

(3) Arbitration shall be by a tribunal composed of a member appointed by Canada, a member appointed by the United States of America and a member appointed jointly by the United States of America and Canada who shall be Chairman. If within six weeks of the delivery of a notice under paragraph (2) either the United States of America or Canada has failed to appoint its member, or they are

unable to agree upon the member who is to be Chairman, either the United States of America or Canada may request the President of the International Court of Justice to appoint the member or members. The decision of a majority of the members of an arbitration tribunal shall be the decision of the tribunal.

(4) The United States of America and Canada shall accept as definitive and binding and shall carry out any decision of the International Joint Commission or an arbitration tribunal.

(5) Provision for the administrative support of a tribunal and for remuneration and expenses of its members shall be as agreed in an exchange of notes between the United States of America and Canada.

(6) The United States of America and Canada may agree by an exchange of notes on alternative procedures for settling differences arising under the Treaty, including reference of any difference to the International Court of Justice for decision.

ARTICLE XVII

Restoration of Pre-Treaty Legal Status

(1) Nothing in this Treaty and no action taken or foregone pursuant to its provisions shall be deemed, after its termination or expiration, to have abrogated or modified any of the rights or obligations of the United States of America or Canada under then existing international law, with respect to the uses of the water resources of the Columbia River basin.

(2) Upon termination of this Treaty, the Boundary Waters Treaty, 1909, shall, if it has not been terminated, apply to the Columbia River basin, except insofar as the provisions of that Treaty may be inconsistent with any provision of this Treaty which continues in effect.

(3) Upon termination of this Treaty, if the Boundary Waters Treaty, 1909, has been terminated in accordance with Article XIV of that Treaty, the provisions of Article II of

that Treaty shall continue to apply to the waters of the Columbia River basin.

(4) If upon the termination of this Treaty Article II of the Boundary Waters Treaty, 1909, continues in force by virtue of paragraph (3) of this Article the effect of Article II of that Treaty with respect to the Columbia River basin may be terminated by either the United States of America or Canada delivering to the other one year's written notice to that effect; provided however that the notice may be given only after the termination of this Treaty.

(5) If, prior to the termination of this Treaty, Canada undertakes works usable for and relating to a diversion of water from the Columbia River basin, other than works authorized by or undertaken for the purpose of exercising a right under Article XIII or any other provision of this Treaty, paragraph (3) of this Article shall cease to apply one year after delivery by either the United States of America or Canada to the other of written notice to that effect.

ARTICLE XVIII

Liability for Damage

(1) The United States of America and Canada shall be liable to the other and shall make appropriate compensation to the other in respect of any act, failure to act, omission or delay amounting to a breach of the Treaty or of any of its provisions other than an act, failure to act, omission or delay occurring by reason of war, strike, major calamity, act of God, uncontrollable force or maintenance curtailment.

(2) Except as provided in paragraph (1) neither the United States of America nor Canada shall be liable to the other or to any person in respect of any injury, damage or loss occurring in the territory of the other caused by any act, failure to act, omission or delay under the Treaty whether the injury, damage or loss results from negligence or otherwise.

(3) The United States of America and Canada, each to the extent possible within its territory, shall exercise due diligence to remove the cause of and to mitigate the effect of any injury, damage or loss occurring in the territory of the other as a result of any act, failure to act, omission or delay under the Treaty.

(4) Failure to commence operation as required under Articles IV and XII is not a breach of the Treaty and does not result in the loss of rights under the Treaty if the failure results from a delay that is not wilful or reasonably avoidable.

(5) The compensation payable under paragraph (1):

(a) in respect of a breach by Canada of the obligation to commence full operation of a storage, shall be forfeiture of entitlement to downstream power benefits resulting from the operation of that storage, after operation commences, for a period equal to the period between the day of commencement of operation and the day when commencement should have occurred;

(b) in respect of any other breach by either the United States of America or Canada, causing loss of power benefits, shall not exceed the actual loss in revenue from the sale of hydroelectric power.

ARTICLE XIX

Period of Treaty

(1) The Treaty shall come into force on the ratification date.

(2) Either the United States of America or Canada may terminate the Treaty other than Article XIII (except paragraph (1) thereof), Article XVII and this Article at any time after the Treaty has been in force for sixty years if it has delivered at least ten years written notice to the other of its intention to terminate the Treaty.

(3) If the Treaty is terminated before the end of the useful life of a dam built under Article XII then, notwithstanding termination, Article XII remains in force until the end of the useful life of the dam.

(4) If the Treaty is terminated before the end of the useful life of the facilities providing the storage described in Article IV(3) and if the conditions described therein exist then, notwithstanding termination, Articles IV(3) and VI(4) and (5) remain in force until either the end of the useful life of those facilities or until those conditions cease to exist, whichever is the first to occur.

ARTICLE XX

Ratification

The instruments of ratification of the Treaty shall be exchanged by the United States of America and Canada at Ottawa, Canada.

ARTICLE XXI

Registration with the United Nations

In conformity with Article 102 of the Charter of the United Nations, the Treaty shall be registered by Canada with the Secretariat of the United Nations.

This Treaty has been done in duplicate copies in the English language.

IN WITNESS WHEREOF the undersigned, duly authorized by their respective Governments, have signed this Treaty at Washington, District of Columbia, United States of America, this 17th day of January, 1961.

FOR THE UNITED STATES OF AMERICA:

DWIGHT D. EISENHOWER
President of the United States of America

CHRISTIAN A. HERTER
Secretary of State

ELMER F. BENNETT
Under Secretary of the Interior

FOR CANADA:

JOHN G. DIEFENBAKER
Prime Minister of Canada

E. D. FULTON
Minister of Justice

A. D. P. HEENEY
Ambassador Extraordinary and Plenipotentiary of Canada to the United States of America

ANNEX A

PRINCIPLES OF OPERATION

General

1. The Canadian storage provided under Article II will be operated in accordance with the procedures described herein.

2. A hydrometeorological system, including snow courses, precipitation stations and stream flow gauges will be established and operated, as mutually agreed by the entities and in consultation with the Permanent Engineering Board, for use in establishing data for detailed programming of flood control and power operations. Hydrometeorological information will be made available to the entities in both countries for immediate and continuing use in flood control and power operations.

3. Sufficient discharge capacity at each dam to afford the desired regulation for power and flood control will be provided through outlet works and turbine installations as mutually agreed by the entities. The discharge capacity provided for flood control operations will be large enough to pass inflow plus sufficient storage releases during the evacuation period to provide the storage space required. The discharge capacity will be evaluated on the basis of full use of any conduits provided for that purpose plus one half the hydraulic capacity of the turbine installation at the time of commencement of the operation of storage under the Treaty.

4. The outflows will be in accordance with storage reservation diagrams and associated criteria established for flood control purposes and with reservoir-balance relationships established for power operations. Unless otherwise agreed by the entities the average weekly outflows shall not be less than 3,000 cubic feet per second at the dam described in Article II(2)(a), not less than 5,000 cubic feet per second at the dam described in Article II(2)(b) and not less than 1,000 cubic feet per second at the dam described in Article II(2)(c). These minimum average weekly releases

may be scheduled by the Canadian entity as required for power or other purposes.

Flood Control

5. For flood control operation, the United States entity will submit flood control operating plans which may consist of or include flood control storage reservation diagrams and associated criteria for each of the dams. The Canadian entity will operate in accordance with these diagrams or any variation which the entities agree will not derogate from the desired aim of the flood control plan. The use of these diagrams will be based on data obtained in accordance with paragraph 2. The diagrams will consist of relationships specifying the flood control storage reservations required at indicated times of the year for volumes of forecast runoff. After consultation with the Canadian entity the United States entity may from time to time as conditions warrant adjust these storage reservation diagrams within the general limitations of flood control operation. Evacuation of the storages listed hereunder will be guided by the flood control storage reservation diagrams and refill will be as requested by the United States entity after consultation with the Canadian entity. The general limitations of flood control operation are as follows:

(a) The Dam described in Article II(2)(a) – The reservoir will be evacuated to provide up to 80,000 acre-feet of storage, if required, for flood control use by May 1 of each year.

(b) The Dam described in Article II(2)(b) – The reservoir will be evacuated to provide up to 7,100,000 acre-feet of storage, if required, for flood control use by May 1 of each year.

(c) The Dam described in Article II(2)(c) – The reservoir will be evacuated to provide up to 700,000 acre-feet of storage, if required, for flood control use by April 1 of each year and up to 1,270,000 acre-feet of stor-

age, if required, for flood control use by May 1 of each year.

(d) The Canadian entity may exchange flood control storage provided in the reservoir referred to in subparagraph (b) for additional storage provided in the reservoir referred to in subparagraph (a) if the entities agree that the exchange would provide the same effectiveness for control of floods on the Columbia River at The Dalles, Oregon.

Power

6. For power generating purposes the 15,500,000 acre feet of Canadian storage will be operated in accordance with operating plans designed to achieve optimum power generation downstream in the United States of America until such time as power generating facilities are installed at the site referred to in paragraph 5(a) or at sites in Canada downstream therefrom.

7. After at-site power is developed at the site referred to in paragraph 5(a) or power generating facilities are placed in operation in Canada downstream from that site, the storage operation will be changed so as to be operated in accordance with operating plans designed to achieve optimum power generation at-site in Canada and downstream in the United States of America and Canada, including consideration of any agreed electrical coordination between the two countries. Any reduction in the downstream power benefits in the United States of America resulting from that change in operation of the Canadian storage shall not exceed in any one year the reduction in downstream power benefits in the United States of America which would result from reducing by 500,000 acre-feet the Canadian storage operated to achieve optimum power generation in the United States of America and shall not exceed at any time during the period of the Treaty the reduction in downstream power benefits in the United States of America which would result from similarly reducing the Canadian storage by 3,000,000 acre-feet.

8. After at-site power is developed at the site referred to in paragraph 5(a) or power generating facilities are placed in operation in Canada downstream from that site, storage may be operated to achieve optimum generation of power in the United States of America alone if mutually agreed by the entities in which event the United States of America shall supply power to Canada to offset any reduction in Canadian generation which would be created as a result of such operation as compared to operation to achieve optimum power generation at-site in Canada and downstream in the United States of America and Canada. Similarly, the storage may be operated to achieve optimum generation of power in Canada alone if mutually agreed by the entities in which event Canada shall supply power to the United States of America to offset any reduction in United States generation which would be created as a result of such operation as compared to operation to achieve optimum power generation at-site in Canada and downstream in the United States of America and Canada.

9. Before the first storage becomes operative, the entities will agree on operating plans and the resulting downstream power benefits for each year until the total of 15,500,000 acre-feet of storage in Canada becomes operative. In addition, commencing five years before the total of 15,500,000 acre-feet of storage is expected to become operative, the entities will agree annually on operating plans and the resulting downstream power benefits for the sixth succeeding year of operation thereafter. This procedure will continue during the life of the Treaty, providing to both the entities, in advance, an assured plan of operation of the Canadian storage and a determination of the resulting downstream power benefits for the next succeeding five years.

ANNEX B

DETERMINATION OF DOWNSTREAM POWER BENEFITS

1. The downstream power benefits in the United States of America attributable to operation in accordance with Annex A of the storage provided by Canada under Article II will be determined in advance and will be the estimated increase in dependable hydroelectric capacity in kilowatts for agreed critical stream flow periods and the increase in average annual usable hydroelectric energy output in kilowatt hours on the basis of an agreed period of stream flow record.

2. The dependable hydroelectric capacity to be credited to Canadian storage will be the difference between the average rates of generation in kilowatts during the appropriate critical stream flow periods for the United States of America base system, consisting of the projects listed in the table, with and without the addition of the Canadian storage, divided by the estimated average critical period load factor. The capacity credit shall not exceed the difference between the capability of the base system without Canadian storage and the maximum feasible capability of the base system with Canadian storage, to supply firm load during the critical stream flow periods.

3. The increase in the average annual usable hydroelectric energy will be determined by first computing the difference between the available hydroelectric energy at the United States base system with and without Canadian storage. The entities will then agree upon the part of available energy which is usable with and without Canadian storage, and the difference thus agreed will be the increase in average annual usable hydroelectric energy. Determination of the part of the energy which is usable will include consideration of existing and scheduled transmission facilities and the existence of markets capable of using the energy on a contractual basis similar to the then existing contracts. The part of the available energy which is considered usable shall be the sum of:

(a) the firm energy,

(b) the energy which can be used for thermal power displacement in the Pacific Northwest Area as defined in Paragraph 7, and

(c) the amount of the remaining portion of the available energy which is agreed by the entities to be usable and which shall not exceed in any event 40% of that remainder.

4. An initial determination of the estimated downstream power benefits in the United States of America from Canadian storage added to the United States base system will be made before any of the Canadian storage becomes operative. This determination will include estimates of the downstream power benefits for each year until the total of 15,500,000 acre-feet of Canadian storage becomes operative.

5. Commencing five years before the total of 15,500,000 acre-feet of storage is expected to become operative, estimates of downstream power benefits will be calculated annually for the sixth succeeding year on the basis of the assured plan of operation for that year.

6. The critical stream flow period and the details of the assured plan of operation will be agreed upon by the entities at each determination. Unless otherwise agreed upon by the entities, the determination of the downstream power benefits shall be based upon stream flows for the twenty year period beginning with July 1928 as contained in the report entitled Modified Flows at Selected Power Sites – Columbia River Basin, dated June 1957. No retroactive adjustment in downstream power benefits will be made at any time during the period of the Treaty. No reduction in the downstream power benefits credited to Canadian storage will be made as a result of the load estimate in the United States of America, for the year for which the determination is made, being less than the load estimate for the preceding year.

7. In computing the increase in dependable hydroelectric capacity and the increase in average annual hydroelectric

energy, the procedure shall be in accordance with the three steps described below and shall encompass the loads of the Pacific Northwest Area. The Pacific Northwest Area for purposes of these determinations shall be Oregon, Washington, Idaho and Montana west of the Continental Divide but shall exclude areas served on the ratification date by the California Oregon Power Company and Utah Power and Light Company.

Step I

The system for the period covered by the estimate will consist of the Canadian storage, the United States base system, any thermal installation operated in coordination with the base system, and additional hydroelectric projects which will provide storage releases usable by the base system or which will use storage releases that are usable by the base system. The installations included in this system will be those required, with allowance for adequate reserves, to meet the forecast power load to be served by this system in the United States of America, including the estimated flow of power at points of inter-connection with adjacent areas, subject to paragraph 3, plus the portion of the entitlement of Canada that is expected to be used in Canada. The capability of this system to supply this load will be determined on the basis that the system will be operated in accordance with the established operating procedures of each of the projects involved.

Step II

A determination of the energy capability will be made using the same thermal installation as in Step I, the United States base system with the same installed capacity as in Step I and Canadian storage.

Step III

A similar determination of the energy capability will be made using the same thermal installation as in Step I and the United States base system with the same installed capacity as in Step I.

8. The downstream power benefits to be credited to Canadian storage will be the differences between the determinations in Step II and Step III in dependable hydroelectric capacity and in average annual usable hydroelectric energy, made in accordance with paragraphs 2 and 3.

ANNEX B - TABLE - BASE SYSTEM

Project	Stream	Stream Mile Above Mouth	Usable Storage Acre-feet	Normal Elevation Pool Feet	Normal Elevation Tailwater Feet	Gross Head Feet	Initial Installation No. of Units	Initial Installation Plant Kilowatts (Nameplate)	Estimated Ultimate Installation No. of Units	Estimated Ultimate Installation Plant Kilowatts (Nameplate)
Hungry Horse	S. Fk. Flathead	5	3,161,000(4)	3560	3083	477	4	285,000	4	285,000
Kerr	Flathead	73	1,219,000	2893	2706	187	3	168,000	3	168,000
Thompson Falls	Clark Fork	209	Pondage	2396	2336	60	6	30,000	8	65,000
Noxon Rapids	Clark Fork	170	Pondage	2331	2179	152	4	336,000	5	420,000
Cabinet Gorge	Clark Fork	150	Pondage	2175	2078	97	4	200,000	6	300,000
Albeni Falls	Pend Oreille	90	1,155,000	2062	2034	28	3	42,600	3	42,600
Box Canyon	Pend Oreille	34	Pondage	2031	1989	42	4	60,000	4	60,000
Grand Coulee	Columbia	597	5,232,000(4)	1290(3)(4)	947	343	18	1,944,000	34	3,672,000
Chief Joseph	Columbia	546	Pondage	946	775	171	16	1,024,000	27	1,728,000
Wells(1)	Columbia	516	Pondage	775	707	68	6	400,000	10	666,700
Rocky Reach	Columbia	474	Pondage	707	614	93	7	711,550	11	1,118,150
Rock Island	Columbia	453	Pondage	608(3)	570	38	10	212,100	10	212,100
Wanapum	Columbia	415	Pondage	570	486	84	10	831,250	16	1,330,000
Priest Rapids	Columbia	397	Pondage	486	406	80	10	788,500	16	1,261,600
Brownlee	Snake	285	974,000	2077	1805	272	4	360,400	6	540,600
Oxbow	Snake	273	Pondage	1805	1683	122	4	190,000	5	237,500
Ice Harbor	Snake	10	Pondage	440	343	97	3	270,000	6	540,000
McNary	Columbia	292	Pondage	340	265	75	14	980,000	20	1,400,000
John Day	Columbia	216	Pondage	265	161	104	8	1,080,000	20	2,700,000
The Dalles	Columbia	192	Pondage	160	74	86	16(2)	1,119,000	24(2)	1,743,000
Bonneville	Columbia	145	Pondage	74	15	59	10	518,400	16	890,400
Kootenay Lake	Kootenay	16	673,000	1745	-	-	-	-	-	-
Chelan	Chelan	0	676,000	1100	707	393	2	48,000	4	96,000
Coeur d'Alene L.	Coeur d'Alene	102	223,000	2128	-	-	-	-	-	-
TOTAL 24 PROJECTS			13,313,000(4)			3128	166	11,598,800	258	19,476,650

(1) The Wells project is not presently under construction; when this project or any other project on the main stem of the Columbia River is completed, they will be integral components of the base system.
(2) Includes two 13,500 kilowatt units for fish attraction water.
(3) With flashboards.
(4) In determining the base system capabilities with and without Canadian storage the Hungry Horse reservoir storage will be limited to 3,008,000 acre-feet (normal full pool elevation of 3560 feet) and the Grand Coulee project will not include the effect of adding flashboards, limiting the storage to 5,072,000 acre-feet (normal full pool elevation of 1288 feet). The total usable storage of the base system as so adjusted will be 13,000,000 acre-feet.

BEST AVAILABLE COPY

WHEREAS the Senate of the United States of America by their resolution of March 16, 1961, two-thirds of the Senators present concurring therein, did advise and consent to the ratification of the aforesaid treaty;

WHEREAS the aforesaid treaty was duly ratified by the President of the United States of America on March 23, 1961, in pursuance of the aforesaid advice and consent of the Senate, and was duly ratified on the part of Canada;

WHEREAS it is provided in Article XIX of the aforesaid treaty that the treaty shall come into force on the ratification date and in Article XX of the aforesaid treaty that the instruments of ratification shall be exchanged at Ottawa;

AND WHEREAS the respective instruments of ratification of the aforesaid treaty were duly exchanged at Ottawa on September 16, 1964 by the respective Plenipotentiaries of the United States of America and Canada;

NOW, THEREFORE, be it known that I, Lyndon B. Johnson, President of the United States of America, do hereby proclaim and make public the aforesaid treaty to the end that the said treaty and each and every article and clause thereof may be observed and fulfilled, on and after September 16, 1964, with good faith by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the International Peace Arch, Blaine, Washington, this sixteenth day of September in the year of our Lord one thousand nine hundred sixty-four and of the Independence of the United States of America the one hundred eighty-ninth.

[Seal Omitted]

LYNDON B. JOHNSON

By the President:
DEAN RUSK
Secretary of State

The Canadian Secretary of State for External Affairs
to the Secretary of State

THE SECRETARY OF STATE FOR EXTERNAL AFFAIRS

CANADA

January 22, 1964

SIR,

I have the honour to refer to discussions which have been held between representatives of the Government of Canada and of the Government of the United States of America regarding the Treaty between Canada and the United States of America relating to cooperative development of the water resources of the Columbia River Basin signed at Washington on January 17, 1961. On the basis of these discussions, the Government of Canada understands that the two Governments have agreed to the terms of the attached Protocol.

I should like to propose that, if agreeable to your Government, this Note together with the Protocol attached thereto and your reply, shall constitute an agreement between our two Governments relating to the carrying out of the provisions of the Treaty with effect from the date of the exchange of instruments of ratification of the Treaty.

Accept, Sir, the renewed assurances of my highest consideration.

PAUL MARTIN
Secretary of State
for External Affairs

The Honourable
DEAN RUSK,
Secretary of State of the
United States of America,
Washington.

ANNEX TO EXCHANGE OF NOTES DATED JANUARY 22, 1964 BETWEEN THE GOVERNMENTS OF CANADA AND THE UNITED STATES REGARDING THE COLUMBIA RIVER TREATY

PROTOCOL

1. If the United States entity should call upon Canada to operate storage in the Columbia River Basin to meet flood control needs of the United States of America pursuant to Article IV(2)(b) or Article IV(3) of the Treaty, such call shall be made only to the extent necessary to meet forecast flood control needs in the territory of the United States of America that cannot adequately be met by flood control facilities in the United States of America in accordance with the following conditions:

(1) Unless otherwise agreed by the Permanent Engineering Board, the need to use Canadian flood control facilities under Article IV(2)(b) of the Treaty shall be considered to have arisen only in the case of potential floods which could result in a peak discharge in excess of 600,000 cubic feet per second at The Dalles, Oregon, assuming the use of all related storage in the United States of America existing and under construction in January 1961, storage provided by any dam constructed pursuant to Article XII of the Treaty and the Canadian storage described in Article IV(2)(a) of the Treaty.

(2) The United States entity will call upon Canada to operate storage under Article IV(3) of the Treaty only to control potential floods in the United States of America that could not be adequately controlled by all the related storage facilities in the United States of America existing at the expiration of 60 years from the ratification date but in no event shall Canada be required to provide any greater degree of flood control under Article IV(3) of the Treaty than that provided for under Article IV(2) of the Treaty.

(3) A call shall be made only if the Canadian entity has been consulted whether the need for flood control is, or is likely to be, such that it cannot be met by the use of flood control facilities in the United States of America in accordance with subparagraphs (1) or (2) of this paragraph. Within ten days of receipt of a call, the Canadian entity will communicate its acceptance, or its rejection or proposals for modification of the call, together with supporting considerations. When the communication indicates rejection or modification of the call the United States entity will review the situation in the light of the communication and subsequent developments and will then withdraw or modify the call if practicable. In the absence of agreement on the call or its terms the United States entity will submit the matter to the Permanent Engineering Board provided for under Article XV of the Treaty for assistance as contemplated in Article XV(2)(c) of the Treaty. The entities will be guided by any instructions issued by the Permanent Engineering Board. If the Permanent Engineering Board does not issue instructions within ten days of receipt of a submission the United States entity may renew the call for any part or all of the storage covered in the original call and the Canadian entity shall forthwith honour the request.

2. In preparing the flood control operating plans in accordance with paragraph 5 of Annex A of the Treaty, and in making calls to operate for flood control pursuant to Article IV(2)(b) and Article IV(3) of the Treaty, every effort will be made to minimize flood damage both in Canada and the United States of America.

3. The exchange of Notes provided for in Article VIII(1) of the Treaty shall take place contemporaneously with the exchange of the Instruments of Ratification of the Treaty provided for in Article XX of the Treaty.

4.(1) During the period and to the extent that the sale of Canada's entitlement to downstream power benefits within the United States of America as a result of an

exchange of Notes pursuant to Article VIII(1) of the Treaty relieves the United States of America of its obligation to provide east-west standby transmission service as called for by Article X(1) of the Treaty, Canada is not required to make payment for the east-west standby transmission service with regard to Canada's entitlement to downstream power benefits sold in the United States of America.

(2) The United States of America is not entitled to any payments of the character set out in subparagraph (1) of this paragraph in respect of that portion of Canada's entitlement to downstream power benefits delivered by the United States of America to Canada at any point on the Canada-United States of America boundary other than at a point near Oliver, British Columbia, and the United States of America is not required to provide the east-west standby transmission service referred to in subparagraph (1) of this paragraph in respect of the portion of Canada's entitlement to downstream power benefits which is so delivered.

5. Inasmuch as control of historic streamflows of the Kootenay River by the dam provided for in Article XII(1) of the Treaty would result in more than 200,000 kilowatt years per annum of energy benefit downstream in Canada, as well as important flood control protection to Canada, and the operation of that dam is therefore of concern to Canada, the entities shall, pursuant to Article XIV(2)(a) of the Treaty, cooperate on a continuing basis to coordinate the operation of that dam with the operation of hydroelectric plants on the Kootenay River and elsewhere in Canada in accordance with the provisions of Article XII(5) and Article XII(6) of the Treaty.

6.(1) Canada and the United States of America are in agreement that Article XIII(1) of the Treaty provides to each of them a right to divert water for a consumptive use.

(2) Any diversion of water from the Kootenay River when once instituted under the provisions of Article XIII of the Treaty is not subject to any limitation as to time.

7. As contemplated by Article IV(1) of the Treaty, Canada shall operate the Canadian storage in accordance with Annex A and hydroelectric operating plans made thereunder. Also, as contemplated by Annexes A and B of the Treaty and Article XIV(2)(k) of the Treaty, these operating plans before they are agreed to by the entities will be conditioned as follows:

(1) As the downstream power benefits credited to Canadian storage decrease with time, the storage required to be operated by Canada pursuant to paragraphs 6 and 9 of Annex A of the Treaty, will be that required to produce those benefits.

(2) The hydroelectric operating plans, which will be based on Step I of the studies referred to in paragraph 7 of Annex B of the Treaty, will provide a reservoir-balance relationship for each month for the whole of the Canadian storage committed rather than a separate relationship for each of the three Canadian storages. Subject to compliance with any detailed operating plan agreed to by the entities as permitted by Article XIV(2)(k) of the Treaty, the manner of operation which will achieve the specific storage or release of storage called for in a hydroelectric operating plan consistent with optimum storage use will be at the discretion of the Canadian entity.

(3) Optimum power generation at-site in Canada and downstream in Canada and the United States of America referred to in paragraph 7 of Annex A of the Treaty will include power generation at-site and downstream in Canada of the Canadian storages referred to in Article II(2) of the Treaty, power generation in Canada which is coordinated therewith, downstream power benefits from the Canadian storage which are produced in the United States of

America and measured under the terms of Annex B of the Treaty, power generation in the Pacific Northwest Area of the United States of America and power generation coordinated therewith.

8. The determination of downstream power benefits pursuant to Annex B of the Treaty, in respect of each year until the expiration of thirty years from the commencement of full operation in accordance with Article IV of the Treaty of that portion of the Canadian storage described in Article II of the Treaty which is last placed in full operation, and thereafter until otherwise agreed upon by the entities, shall be based upon stream flows for the thirty-year period beginning July 1928 as contained in the report entitled "Extension of Modified Flows Through 1958 – Columbia River Basin" and dated June 1960, as amended and supplemented to June 29, 1961, by the Water Management Subcommittee of the Columbia Basin Inter-Agency Committee.

9.(1) Each load used in making the determinations required by Steps II and III of paragraph 7 of Annex B of the Treaty shall have the same shape as the load of the Pacific Northwest area as that area is defined in that paragraph.

(2) The capacity credit of Canadian storage shall not exceed the difference between the firm load carrying capabilities of the projects and installations included in Step II of paragraph 7 of Annex B of the Treaty and the projects and installations included in Step III of paragraph 7 of Annex B of the Treaty.

10. In making all determinations required by Annex B of the Treaty the loads used shall include the power required for pumping water for consumptive use into the Banks Equalizing Reservoir of the Columbia Basin Federal Reclamation Project but mention of this particular load is not intended in any way to exclude from those loads any use of power that would normally be part of such loads.

11. In the event operation of any of the Canadian storages is commenced at a time which would result in the United States of America receiving flood protection for periods longer than those on which the amounts of flood control payments to Canada set forth in Article VI(1) of the Treaty are based, the United States of America and Canada shall consult as to the adjustments, if any, in the flood control payments that may be equitable in the light of all relevant factors. Any adjustment would be calculated over the longer period or periods on the same basis and in the same manner as the calculation of the amounts set forth in Article VI(1) of the Treaty. The consultations shall begin promptly upon the determination of definite dates for the commencement of operation of the Canadian storages.

12. Canada and the United States of America are in agreement that the Treaty does not establish any general principle or precedent applicable to waters other than those of the Columbia River Basin and does not detract from the application of the Boundary Waters Treaty, 1909, to other waters.

The Secretary of State to the Canadian Secretary of State for External Affairs

DEPARTMENT OF STATE
WASHINGTON
January 22, 1964

SIR:

I have the honor to refer to your note dated January 22, 1964, together with the Annex thereto regarding the Treaty between Canada and the United States of America relating to cooperative development of the water resources of the Columbia River Basin signed at Washington on January 17, 1961.

I wish to advise you that the Government of the United States of America agrees that your note with the Annex thereto, together with this reply, shall constitute an agreement between our two Governments relating to the carrying out of the provisions of the Treaty with effect from the date of the exchange of instruments of ratification of the Treaty.

Accept, Sir, the renewed assurances of my highest consideration.

DEAN RUSK

The Honorable
PAUL MARTIN, P.C., Q.C.,
Secretary of State for External Affairs,
Ottawa.

DEPARTMENT OF STATE
WASHINGTON
January 22, 1964

SIR:

I have the honor to refer to the discussions which have been held between representatives of the Government of Canada and of the Government of the United States of America regarding a sale of Canada's entitlement to downstream power benefits under the Treaty between Canada and the United States of America relating to cooperative development of the water resources of the Columbia River Basin, signed on January 17, 1961.

On the basis of these discussions my Government understands that the two Governments recognize that it would be in the public interest of both countries if Canada's entitlement to downstream power benefits could be disposed of, as contemplated by Article VIII of the Treaty, in accordance with general conditions and limits similar to those set out in detail in the attachment hereto, and further, that before such a disposition can be concluded and confirmed by the two Governments, additional steps must be taken in each country. Therefore, in furtherance of this aim, it is understood the two Governments are agreed that:

a) the Government of the United States will use its best efforts to arrange for disposition of Canada's entitlement to downstream power benefits within the United States of America in accordance with the general conditions and limits set forth in the attachment, and

b) the Government of Canada will use its best efforts to accomplish all those things which are considered necessary and preliminary to ratification of the Treaty as quickly as possible, including any arrangements for implementation and acceptance of the general conditions and limits set forth in the attachment.

I should like to propose that if agreeable to your Government this note together with the attachment and your reply shall constitute an agreement by our Governments relating to the Treaty.

Accept, Sir, the renewed assurances of my highest consideration.

DEAN RUSK

The Honorable
PAUL MARTIN, P.C., Q.C.,
Secretary of State for External Affairs,
Ottawa

ATTACHMENT RELATING TO TERMS OF SALE

A. The disposition shall consist of the downstream power benefits to which Canada is entitled under the Treaty, other than Canada's entitlement to downstream power benefits resulting from the construction or operation of a project described in Article IX of the Treaty, and shall be by way of a contract of sale authorized in accordance with Article VIII of the Treaty between the British Columbia Hydro and Power Authority and a single Purchaser containing provisions mutually satisfactory to the parties to the contract but shall be subject to and be operative in accordance with the following general conditions and limits:

1. (a) The storages described in Article II of the Treaty shall be fully operative for power purposes in accordance with the following schedule:

Storage described in Article II(2)(c) – approximately 1,400,000 acre feet on April 1, 1968,

Storage described in Article II(2)(b) – approximately 7,100,000 acre feet on April 1, 1969,

Storage described in Article II(2)(a) – approximately 7,000,000 acre feet on April 1, 1973.

(b) The period of sale of the entitlement allocated to each of the storages shall terminate and expire thirty years from the date on which that storage is required to be fully operative for power purposes in accordance with the schedule in subparagraph (a) of this paragraph.

(c) In the event any storage is not fully operative in accordance with the schedule in subparagraph (a) of this paragraph or if, during the period of sale, the storage is not operated as required by the hydroelectric operating plans agreed upon in accordance with the Treaty, as modified by any detailed operating plan agreed upon in accordance with Article XIV(2)(k) of

the Treaty, and the Canadian entitlement is thereby reduced, the British Columbia Hydro and Power Authority shall pay the Purchaser an amount equal to the cost it would have to incur to replace that part of the reduction in the Canadian entitlement which the vendees of the Purchaser could have used other than costs that could have been avoided had every reasonable effort to mitigate losses been made by the Purchaser, the United States entity and the owners of non-federal dams on the Columbia River in the United States of America. Alternatively, the British Columbia Hydro and Power Authority may, at its option, supply power to the Purchaser in an amount which assures that the Purchaser receives the capacity and energy which would have constituted that part of the reduction in the Canadian entitlement that the vendees of the Purchaser could have used if there had been no default, together with appropriate adjustments to reflect transmission costs in the United States of America, delivery to be made when the loss of power would otherwise have occurred.

If the assurance described in paragraph B.5. of this attachment is given to the Purchaser, the United States entity may succeed to all the rights of the Purchaser and its vendees to receive the entire Canadian entitlement, or that part that could be used by the vendees, and to be compensated by British Columbia Hydro and Power Authority in the event of non-receipt thereof. The United States entity agrees that before it purchases more costly power from any third party for the purpose of supplying the necessary amount of the Canadian entitlement to the Purchaser, it will first cause to be delivered to the Purchaser, or for

its account, any available surplus capacity or energy from the United States Federal Columbia River System and compensation to the United States entity because of such deliveries shall be computed by applying the then applicable rate schedules of the Bonneville Power Administration to the deliveries.

In the event of disagreement, determination of compensation in money or power due under this paragraph shall be resolved by arbitration and shall be confined to the actual loss incurred in accordance with the principles in this paragraph.

(d) For the purpose of allocating downstream power benefits among the Treaty storages from April 1, 1998 to April 1, 2003, the percentage of downstream power benefits allocated to each Treaty storage shall be the percentage of the total of the Treaty storages provided by that storage.

2. For the period of the sale the British Columbia Hydro and Power Authority shall operate and maintain the Treaty storages in accordance with the provisions of the Treaty.

3. (a) The purchase price of the entitlement shall be $254,400,000, in United States funds as of October 1, 1964, subject to adjustment, in the event of an earlier payment of all or part thereof, to the then present worth, at a discount rate of 4 1/2 percent per annum.

(b) The purchase price shall be paid to Canada contemporaneously with the exchange of ratifications of the Treaty and shall be applied towards the cost of constructing the Treaty projects through a transfer of the purchase price by Canada to the Government of British Columbia, pursuant to arrangements deemed sat-

isfactory to Canada, to be entered into between Canada and the Government of British Columbia.

4. If, during the period of the sale, there is any reduction in Canada's entitlement to downstream power benefits which results from action taken by the Canadian entity pursuant to paragraph 7 of Annex A of the Treaty, the British Columbia Hydro and Power Authority shall, by supplying power to the Purchaser, or otherwise as may be agreed, offset that reduction in a manner so that the Purchaser will be compensated therefor.

5. The Purchaser shall have and may exercise the rights of the British Columbia Hydro and Power Authority relating to the negotiation and conclusion with the United States entity, of proposals relating to the exchanges authorized by Article VIII(2) of the Treaty with respect to any portion of Canada's entitlement to downstream power benefits sold to the Purchaser.

B. The Notes to be exchanged pursuant to Article VIII(1) of the Treaty shall contain, inter alia, provisions incorporating the following requirements:

1. As soon as practicable after start of construction of each Treaty project the Canadian and United States entities shall agree upon a program for filling the storage provided by the project. The filling program shall have the objective of having the storages described in Article II(2)(c) and Article II(2)(b) of the Treaty full by September 1 following the date when the storages become fully operative and the storage provided by the dam mentioned in Article II(2)(a) of the Treaty full to 15 million acre-feet by September 1, 1975. This objective shall be reflected in the hydroelectric operating plans and shall take into account generating requirements at-site and downstream in Canada and the United States of America to meet loads.

2. In the event the United States of America becomes entitled to compensation in respect of a breach of the obligation under Article IV(6) of the Treaty to commence full operation of a storage, compensation payable to the United States of America under Article XVIII(5)(a) of the Treaty shall be made in an amount equal to 2.70 mills per kilowatt-hour, and 46 cents per kilowatt of dependable capacity for each month or fraction thereof, in United States funds, for and in lieu of the power which would have been forfeited under Article XVIII(5)(a) of the Treaty if Canada's entitlement to downstream power benefits had not been sold in the United States of America. Alternatively, Canada may, at its option, supply capacity and energy to the United States entity in an amount equal to that which would have been forfeited, together with appropriate adjustments to reflect transmission costs in the United States of America, delivery to be made when the loss would otherwise have occurred.

3. A diminution of Canada's entitlement to downstream power benefits sold in the United States of America which is directly attributable to a failure to comply with paragraph A.1(a) or paragraph A.2 of this attachment, in the absence of compensation therefor by the British Columbia Hydro and Power Authority, constitutes a breach of the Treaty by Canada and Article XVIII(5) of the Treaty and the exculpatory provisions in Article XVIII of the Treaty do not apply to such breach. Compensation or replacement of power as specified in paragraph A.1(c) of this attachment shall be made by Canada and shall be accepted by the United States of America as complete satisfaction of Canada's liability under this paragraph.

4. For any year in which Canada's entitlement to downstream power benefits is sold in the United

States of America, the United States entity may decide the amount of the downstream power benefits for purposes connected with the disposition thereof in the United States of America. This authorization, however, shall not affect the rights or relieve the obligations of the Canadian and United States entities relating to joint activities under the provisions of Article XIV and Annexes A and B of the Treaty; nor shall it apply to determination of compensation provided for in paragraph A.1(c) and paragraph B.2 of this attachment.

5. If necessary to accomplish the sale of Canada's entitlement to downstream power benefits in accordance with this attachment, the United States entity shall assure unconditionally the delivery to or for the account of the Purchaser, by appropriate exchange contracts, of an amount of power agreed between the United States entity and the Purchaser to be the equivalent of the entitlement during the period of the sale.

C. Canada shall designate the British Columbia Hydro and Power Authority as the Canadian entity for the purposes of Article XIV(1) of the Treaty.

The Canadian Secretary of State for External Affairs to the Secretary of State

THE SECRETARY OF STATE FOR EXTERNAL AFFAIRS
CANADA
January 22, 1964

SIR,

I have the honour to refer to your Note dated January 22, 1964, together with the attachment thereto regarding the Treaty between Canada and the United States of America relating to cooperative development of the water resources of the Columbia River Basin signed at Washington on January 17, 1961.

I wish to advise you that the Government of Canada agrees that your Note with the attachment thereto, together with this reply, shall constitute an agreement between our two Governments relating to the Treaty.

Accept, Sir, the renewed assurances of my highest consideration.

PAUL MARTIN
Secretary of State
for External Affairs

The Honourable
DEAN RUSK,
Secretary of State of the
United States of America,
Washington.

The Canadian Secretary of State for External Affairs to the American Ambassador

DEPARTMENT OF EXTERNAL AFFAIRS
CANADA
OTTAWA, *September 16, 1964*

No. 140

EXCELLENCY,

I have the honour to refer to the Treaty between Canada and the United States of America relating to cooperative development of the water resources of the Columbia River Basin signed at Washington on 17 January 1961, to the Protocol attached to my Note to the Honourable Dean Rusk, Secretary of State of the United States of America, dated 22 January 1964, and to the exchange of instruments of ratification of the Treaty which occurred today.

I also have the honour to refer to the discussions which have been held between representatives of the Government of Canada and of the Government of the United States of America in connection with the Exchange of Notes, dated 22 January 1964, regarding sale in the United States of America of Canada's entitlement under the Treaty to downstream power benefits.

My Government also understands that your Government has designated the Administrator of the Bonneville Power Administration, Department of the Interior, and the Division Engineer, North Pacific Division, Corps of Engineers, Department of the Army, as the United States Entity for the purposes of Article XIV(1) of the Treaty, and I would inform you that the Government of Canada has designated the British Columbia Hydro and Power Authority, a corporation incorporated in the Province of British Columbia by the British Columbia Hydro and Power Authority Act, 1964, as the Canadian Entity for the purposes of that Article. A copy of the designation is attached hereto.

On the basis of those discussions the Government of Canada proposes that the Canadian Entitlement Purchase

Agreement regarding the sale in the United States of America of the Canadian Entitlement under the Treaty to downstream power benefits entered into between the British Columbia Hydro and Power Authority and the Columbia Storage Power Exchange, the single purchaser referred to in the attachment to your Note of January 22, 1964, relating to the terms of the sale, a copy of which agreement is attached hereto, be authorized for the purposes of Article VIII(1) of the Treaty as a disposal of the Canadian Entitlement in the United States of America for the period and in accordance with the other terms and provisions set out in the Canadian Entitlement Purchase Agreement.

My Government also understands that your Government pursuant to paragraph E.5 in the attachment to Mr. Secretary Rusk's Note of January 22, 1964, relating to the terms of the sale, has determined that the United States Entity shall enter into and that it has entered into the Canadian Entitlement Exchange Agreements which agreements assure unconditionally the delivery for the account of the Columbia Storage Power Exchange of an amount of power agreed between the United States Entity and the Columbia Storage Power Exchange to be the equivalent of the Canadian Entitlement being sold under the Canadian Entitlement Purchase Agreement, and that the United States Entity has succeeded to all the rights and obligations of the Columbia Storage Power Exchange under the Canadian Entitlement Purchase Agreement other than the obligation to pay the purchase price, and further that the United States Entity has, pursuant to Article XI of the Treaty, approved the use of the improved stream flow in the United States of America brought about by the Treaty by entering into Canadian Entitlement Allocation Agreements with owners of non-Federal dams on the Columbia River.

My Government also understands that the two Governments are agreed that the Government of the United States of America undertakes that:

(1) So long as the Canadian Entitlement Exchange Agreements remain in force, the United States Entity will perform all the obligations of the Columbia Storage Power Exchange under the Canadian Entitlement Purchase Agreement other than the obligation to pay the purchase price specified in Section 3 of the Canadian Entitlement Purchase Agreement;

(2) In the event the Canadian Entitlement is reduced as a result of a failure on the part of the Canadian Entity to comply with Section 4 of the Canadian Entitlement Purchase Agreement and if the failure results other than from wilful omission by the Canadian Entity to fulfill its obligations under that agreement, the United States Entity will, without compensation, offset the effect of that failure by adjusting the operation of the portion of the System described in Step I of paragraph 7 of Annex B of the Treaty which is in the United States of America to the extent that the United States Entity can do so without loss of energy or capacity to that portion of the System; and

(3) If the procedure described in paragraph (2) above does not fully offset the effect of the failure, then to the extent the entities agree thereon, an additional offsetting adjustment in the operation of the portion of the System described in Step I of Annex B of the Treaty which is in the United States of America and which would result in only an energy loss will be made if the Canadian Entity delivers to the United States Entity energy sufficient to make up one half that energy loss.

(4) In order to make up any reduction in the Canadian Entitlement, which reduction is to be determined in accordance with Section 6 of the Canadian Entitlement Purchase Agreement, the United States Entity will cause to be delivered the least expensive capacity and energy available and, to the ex-

tent that it would be the least expensive available, will deliver, at the then applicable rate schedules of the Bonneville Power Administration, any available surplus capacity and energy from the United States Federal Columbia River System.

The Government of Canada also proposes that:

(5) Contemporaneously with the exchange of the instruments of ratification CSPE shall have paid to Canada the sum in United States funds of $253,929,534.25, being the equivalent of the sum of $254,400,000 in United States funds as of October 1, 1964 adjusted to September 16, 1964 at a discount rate of 4 1/2 percent per annum on the basis set out in the January 22, 1964 Exchange of Notes between our two Governments relating to the terms of sale, which sum shall be applied towards the cost of constructing the Treaty projects through a transfer of the sum by Canada to the Government of British Columbia pursuant to arrangements entered into between Canada and British Columbia.

(6) No modification or renewal of the Canadian Entitlement Purchase Agreement shall be effective until approved by the Governments of Canada and the United States of America, evidenced by an Exchange of Notes.

(7) The storages described in Article II of the Treaty shall be considered fully operative when the facilities for such storages are available and outlet facilities are operable for regulating flows in accordance with the flood control and hydroelectric operating plans.

(8) As soon as practicable, the Canadian and United States Entities shall agree upon a program for filling the storage provided by each of the Treaty projects. The filling program shall have the objective of having the storages described in Article II(2)(a),

Article II(2)(b), and Article II(2)(c) of the Treaty filled to the extent that usable storage, in the amounts provided for each storage in Article II of the Treaty is available by September 1 following the date when the storage becomes fully operative, and of having the storage provided by the dam described in Article II(2)(a) filled to 15 million acre-feet by September 1, 1975. This objective shall be reflected in the hydroelectric operating plans and shall take into account generating requirements at-site and downstream in Canada and the United States of America to meet loads and requirements for flood control.

(9) In the event the United States of America becomes entitled to compensation from Canada for loss of downstream power benefits, other than Canada's entitlement to downstream power benefits, in respect of a breach of the obligation under Article IV(6) of the Treaty to commence full operation of a storage, compensation payable to the United States of America under Article XVIII(5)(a) of the Treaty shall be made in an amount equal to 2.70 mills per kilowatt-hour of energy, and 46 cents per kilowatt of dependable capacity for each month or fraction thereof, in United States Funds, for and in lieu of the power which would have been forfeited under Article XVIII(5)(a) of the Treaty if Canada's entitlement to downstream power benefits had not been sold in the United States of America. The power which would have been forfeited shall be Canada's entitlement to downstream power benefits attributable to the particular storage had it commenced full operation in accordance with Article IV(6) of the Treaty and shall consist of (1) dependable capacity for the period of forfeiture and (2) that portion of average annual usuable energy which would have been available during the period of forfeiture assuming the energy to be available at

a uniform rate throughout the year. Alternatively, Canada may, at its option, offset the power for which compensation is to be made by delivering capacity and energy to the United States Entity, such delivery to be made, unless otherwise agreed by the entities, during the period of breach and at a uniform rate. The option for Canada to provide power in place of paying money shall permit Canada to make compensation partly by supplying power and partly by paying money, as may be mutually agreed by the entities.

(10) The Canadian Entity shall at reasonable intervals provide current reports to the United States Entity of the progress of construction of the Treaty storages. In the event there is a likelihood of delay in meeting the completion dates set out in Section 4 of the Canadian Entitlement Purchase Agreement or a delay which will give rise to a claim under paragraph (9) hereof the Canadian Entity will advise of the probability of power being available to make the compensation required.

(11) To the extent the Canadian Entity does not make compensation for a reduction in the Canadian Entitlement arising as a result of a failure to comply with Section 4 of the Canadian Entitlement Purchase Agreement, Canada shall make such compensation and such compensation shall be accepted in complete satisfaction of all claims arising out of the failure in respect of the reduction in the Canadian Entitlement for which such compensation was made.

(12) For any year in which Canada's Entitlement to downstream power benefits is sold to Columbia Storage Power Exchange, the United States Entity may decide the amount of the downstream power benefits for purposes connected with the disposition thereof in the United States of America. This authorization, however, shall neither affect the

rights or relieve the obligations of the Canadian and United States Entities relating to joint activities under the provisions of Article XIV and Annexes A and B of the Treaty, nor shall it apply to determination of compensation provided for in the Canadian Entitlement Purchase Agreement or pursuant to paragraph (9) hereof or to determination of the power benefits to which Canada is entitled.

(13) Any power delivered by the Canadian Entity or by Canada in accordance with the Canadian Entitlement Purchase Agreement or this Note shall be delivered at points of interconnection on the Canadian-United States border mutually acceptable to the entities. Appropriate adjustments shall be made to reflect transmission costs and transmission losses in the United States of America.

(14) Any dispute arising under the Canadian Entitlement Purchase Agreement, including, but without limitation, a dispute whether any event requiring compensation has occurred, the amount of compensation due or the amount of any overdelivery of power is agreed to be a difference under the Treaty to be settled in accordance with the provisions of Article XVI of the Treaty, and the parties to the Canadian Entitlement Purchase Agreement may avail themselves of the jurisdiction hereby conferred.

The Government of Canada therefore proposes that if agreeable to your Government this Note together with your reply thereto constitutes an agreement by our Governments relating to the Treaty with effect from the date of the exchange of instruments of ratification of the Treaty.

Accept, Excellency, the renewed assurances of my highest consideration.

PAUL MARTIN

Secretary of State
for External Affairs

His Excellency,
W. WALTON BUTTERWORTH,
Ambassador of the United States
of America,
Ottawa.

P.C. 1964-1407

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 4th September, 1964.

CANADA
PRIVY COUNCIL

The Committee of the Privy Council, on the recommendation of the Right Honourable Lester B. Pearson, the Prime Minister, advise that Your Excellency may be pleased to designate the British Columbia Hydro and Power Authority, a corporation incorporated in the Province of British Columbia by the British Columbia Hydro and Power Authority Act 1964, as the Canadian entity for the purposes of Article XIV of a treaty dated January 17, 1961 at Washington, D.C. U.S.A. between Canada and the United States of America relating to co-operative development of the water resources of the Columbia River Basin, such designation to take effect on the date on which the Instruments of Ratification of the Treaty shall be exchanged.

/s/ [Illegible]
CLERK OF THE PRIVY COUNCIL

CANADIAN ENTITLEMENT PURCHASE AGREEMENT

This Agreement executed this thirteenth day of August, 1964, by and between COLUMBIA STORAGE POWER EXCHANGE, a nonprofit corporation organized under the laws of the State of Washington, hereinafter referred to as "CSPE",

and

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY, a corporation incorporated in the Province of British Columbia, Canada, by the British Columbia Hydro and Power Authority Act, 1964, hereinafter referred to as "the Authority".

WHEREAS:

A. The Governments of the United States of America and Canada are exchanging instruments of ratification of the Treaty Between Canada and the United States of America Relating to the Cooperative Development of the Water Resources of the Columbia River Basin Signed at Washington January 17, 1961. By an Exchange of Notes dated January 22, 1964, the two Governments agreed upon the terms of a Protocol with effect from the date of the exchange of instruments of ratification of the Treaty aforesaid (which Treaty and Protocol are hereinafter referred to as the "Treaty").

B. Under the terms of the Treaty, Canada is entitled to receive from the United States one half of the annual average usable energy and one half of the dependable hydroelectric capacity which can be realized in the United States each year as a result of use of the improved stream flow on the Columbia River created by storage to be constructed in Canada.

C. The Government of Canada and the Government of British Columbia have entered into an agreement dated 8 July, 1963, and a supplementary agreement dated 13 January, 1964, wherein it was agreed that all proprietary rights, title and interests arising under the Treaty, including all rights to downstream power benefits, belong to the

Government of British Columbia, and providing that Canada shall designate the Authority as the Canadian Entity as provided for in Article XIV of the Treaty. Pursuant to such agreement Canada is designating the Authority as the Canadian Entity.

D. The Authority is, by virtue of an Order in Council of the Province of British Columbia, dated August 7, 1964, required and authorized to exercise all the rights and powers granted to the Canadian Entity and to perform all the obligations imposed on the Canadian Entity by the Treaty and to enter into this Agreement.

E. CSPE is incorporated with the object of purchasing for a term of years Canada's rights to downstream power benefits under the Treaty and incurring indebtedness to finance such purchase and disposing of such rights under such arrangements as may be necessary to retire the corporate indebtedness and to pay the necessary expenses of CSPE incidental thereto.

F. The Governments of the United States of America and Canada, as contemplated by Article VIII of the Treaty and in pursuance of the Agreement of the two Governments contained in an Exchange of Notes dated January 22, 1964, relating thereto, are by an Exchange of Notes authorizing the disposition for a term of years within the United States of America of Canada's rights to downstream power benefits under the Treaty, which disposition when so authorized is to be effectuated by this Agreement in accordance with the provisions of the Treaty and documents supplementary thereto.

NOW, THEREFORE, it is agreed:

SECTION 1. TERM.

This Agreement shall be effective when authorized by the Governments of Canada and the United States of America by an Exchange of Notes pursuant to the Treaty and shall terminate at midnight on March 31, 2003.

SECTION 2. CONVEYANCE.

(1) The Authority does hereby sell, assign, and convey unto CSPE, and CSPE does hereby accept, the entitlement of Canada, as described in Article V(1) of the Treaty, to the downstream power benefits determined in accordance with Article VII of the Treaty, save and except the entitlement of Canada to the downstream power benefits resulting from the construction or operation of the project referred to in Article IX of the Treaty, for the following periods of time:

(a) The benefits resulting from the storage described in Article II(2)(c) of the Treaty (hereinafter referred to as Duncan Lake storage) for a period of 30 years commencing April 1, 1968; and

(b) The benefits resulting from the storage described in Article II(2)(b) of the Treaty (hereinafter referred to as Arrow Lakes storage) for a period of 30 years commencing April 1, 1969; and

(c) The benefits resulting from the storage described in Article II(2)(a) of the Treaty (hereinafter referred to as Mica Creek storage) for a period of 30 years commencing April 1, 1973.

(2) All of the entitlement to the downstream power benefits hereby conveyed for the aforementioned periods of time, without the reductions provided for in paragraph 7 of Annex A of the Treaty is hereinafter referred to as "the Canadian Entitlement".

(3) For the purpose of allocating downstream power benefits among the three Canadian storages provided for in the Treaty between April 1, 1998, and March 31, 2003, the percentage of downstream power benefits allocable to each of the said storages shall be the percentage of the total of the Canadian storages provided by that storage as set out in Article II of the Treaty.

SECTION 3. PAYMENT BY CSPE.

Contemporaneously with the exchange of the instruments of ratification, CSPE is causing to be paid to Can-

ada the sum, in United States funds, of $254,400,000.00 as of October 1, 1964, subject to adjustment in the event of an earlier payment thereof to the then present worth at a discount rate of 4 1/2 percent per annum, which sum shall be applied towards the cost of constructing the Treaty projects through a transfer of the sum by Canada to the Government of British Columbia pursuant to arrangements entered into between Canada and British Columbia. The Authority acknowledges that the receipt by Canada of the said sum is consideration for all the covenants of the authority in this Agreement and particularly the covenants to construct and operate the Treaty projects and is a complete discharge of CSPE for the full purchase price for the sale effected in Section 2 of this Agreement.

SECTION 4. COVENANTS.

(1) The Authority covenants and agrees with CSPE that it will undertake all requisite construction work in a good and workmanlike manner and that the storages described in Article II of the Treaty shall be fully operative for power purposes under this Agreement by the following dates:

(a) The Duncan Lake storage, April 1, 1968.

(b) The Arrow Lakes storage, April 1, 1969.

(c) The Mica Creek storage, April 1, 1973.

To be fully operative the facilities for such storages shall be completed to the extent that storages are available and outlet facilities are operable for regulating flows in accordance with flood control and hydroelectric operating plans as contemplated by the Treaty.

(2) The Authority covenants and agrees with CSPE that it will operate and maintain the Treaty storages in a good and workmanlike manner and in accordance with the provisions of the Treaty and any arrangements made pursuant to the Treaty and that it will not take any action prohibited by the Treaty.

SECTION 5. FLOOD CONTROL.

Nothing in this Agreement affects or alters the obligations, rights, and privileges of the entities under the

Treaty relating to operation and compensation for flood control and without restricting the generality of the foregoing, it is expressly agreed that any reduction in generation in the United States brought about by operation for flood control under the Treaty or any flood control arrangements made pursuant to the Treaty shall not be a reduction in the Canadian Entitlement for which compensation is required under this Agreement.

SECTION 6. COMPENSATION.

In the event the Canadian Entitlement is reduced as a result of a failure to comply with Section 4 of this Agreement:

(1) If the failure results other than from wilful omission by the Authority to fulfill its obligations under this Agreement, the United States Entity has agreed that it will, without compensation, offset the effect of that failure by adjusting the operation of the portion of the system described in Step I of paragraph 7 of Annex B of the Treaty which is in the United States to the extent that the United States Entity can do so without loss of energy or capacity to that portion of the System. If the foregoing procedure does not fully offset the effect of the failure, then to the extent the entities agree thereon, an additional offsetting adjustment in the operation of the portion of the system described in Step I of Annex B of the Treaty which is in the United States and which would result in only an energy loss will be made if the Authority delivers to the United States Entity energy sufficient to make up one half of that energy loss.

(2) If the effect of the failure is not entirely offset by the procedure specified in subsection (1) of this section, the reduction in the Canadian Entitlement shall be deemed to be one half of the difference in dependable hydroelectric capacity and average annual usable energy, capable of being produced by:

(a) the Step II system as specified in Annex B of the Treaty for the year in which the reduction occurs,

using the 30 year stream flow record provided for in Section 8 of the Protocol, with allowance in each of the 30 stream flow years for the effect of the Adjustment made in following the procedure specified in subsection (1) of this section and

(b) the same system for that year with the application of allowance in each of the 30 stream flow years for the effects of the occurrence causing the reduction

and the dependable hydroelectric capacity and average annual usable energy for the purpose of paragraph (b) of this subsection shall be calculated on the basis of an operation for optimum generation in the United States in the light of the offsetting adjustments and in the light of the effects of the occurrence causing the reduction.

(3) If the failure is the result of an occurrence to which the procedure specified in subsection (1) of this section is not applicable, the reduction shall be deemed to be one half of the difference in dependable hydroelectric capacity and average annual usable energy, capable of being produced by:

(a) the Step II system as specified in Annex B of the Treaty for the year in which the reduction occurs, using the 30 year stream flow record provided for in Section 8 of the Protocol, with no allowance for the effects of the occurrence causing the reduction and

(b) the same system for that year with the application of allowance in each of the 30 stream flow years for the effects of the occurrence causing the reduction

and the dependable hydroelectric capacity and average annual usable energy for the purposes of paragraph (b) of this subsection shall be calculated on the basis of an operation for optimum generation in the United States in the light of the effects of the occurrence causing the reduction.

(4) The Authority shall make compensation for reductions in the Canadian Entitlement, which reductions are to be determined in accordance with subsections (2) or (3)

of this section, in amounts equal to the cost of replacing the reductions in the Canadian Entitlement.

(5) The Authority may at its option, and in lieu of the monetary compensation payable under subsection (4) of this section, make compensation by supplying capacity and energy in an amount equal to the reduction in the Canadian Entitlement determined in accordance with subsections (2) or (3) of this section and adjusted to reflect transmission costs in the United States, delivery to be made when the loss would otherwise have occurred. The Authority may provide combinations of money, capacity and energy that are mutually acceptable in discharge of its obligation to make compensation under this section.

(6) The Authority shall give notice as soon as possible after it becomes apparent to it that compensation may be due and will at that time indicate the amounts of capacity and energy which it anticipates it will be able to make available.

(7) The United States Entity has agreed that, in order to make up any reduction in the Canadian Entitlement, it will cause to be delivered the least expensive capacity and energy available and, to the extent that it would be the least expensive, will deliver at the then applicable rate schedules of the Bonneville Power Administration any available surplus capacity and energy from the United States Federal Columbia River System. The cost of replacement referred to in subsection (4) of this section shall be determined as if the reduction was in fact made up as contemplated by the agreement referred to in the preceding sentence.

(8) Compensation made in accordance with this section shall be accepted as satisfaction of all claims against the Authority with respect to the reduction in the Canadian Entitlement for which such compensation was made and with respect to the act or omission of the Authority from which the right to such compensation arose.

(9) Any obligation to mitigate damages by the United States Entity, CSPE, the vendees of CSPE, and the owners of the non-Federal dams on the Columbia River in the United States is satisfied by compliance with this section.

(10) If the Canadian Entitlement Exchange Agreements referred to in Section 10 are not in force, compensation for a reduction in the Canadian Entitlement in accordance with subsections (2) and (3) of this section, is required only in respect of that part of the reduction in the Canadian Entitlement which CSPE and its vendees could have used and only in respect of costs that could not have been avoided had every reasonable effort to mitigate been made by CSPE and the owners of non-Federal dams on the Columbia River in the United States.

SECTION 7. REDUCTION OF THE CANADIAN ENTITLEMENT IN ACCORDANCE WITH THE TREATY.

Any reduction in the Canadian Entitlement resulting from action taken pursuant to paragraph 7 of Annex A of the Treaty shall be determined in accordance with subsection (3) of Section 6 of this Agreement and unless otherwise agreed, the Authority shall offset the reduction by supplying capacity and energy equal to the reduction, the energy to be supplied in equal monthly amounts.

SECTION 8. SETTLEMENT OF DISPUTES.

Any dispute arising under this Agreement, including but without limitation a dispute as to whether any event requiring compensation has occurred, the amount of compensation due or the amount of any overdelivery of power, is agreed to be a difference under the Treaty to be settled in accordance with the provisions of Article XVI of the Treaty. Any determination of compensation in money or power due shall be confined to the actual loss incurred in accordance with the principles contained in Section 6 of this Agreement.

SECTION 9. EXCHANGES OF CAPACITY AND ENERGY.

(1) The Authority agrees that CSPE shall have and may exercise the rights of the Authority as the Canadian En-

tity relating to the negotiation and conclusion with the United States Entity of proposals relating to the exchanges authorized by Article VIII(2) of the Treaty with respect to any portion of the Canadian Entitlement.

(2) It is agreed that no exchange of capacity for energy or of energy for capacity or modification in the delivery of energy in equal amounts each month as provided in the Treaty shall be taken into account in the determination of compensation to be made by the Authority pursuant to this Agreement.

SECTION 10. EXCHANGE AGREEMENTS.

The Bonneville Power Administrator acting as the Administrator and for and on behalf of the United States Entity has by entering into Canadian Entitlement Exchange Agreements, assured unconditionally the delivery to the vendees of CSPE by appropriate exchange contracts of an amount of power agreed between the United States Entity and CSPE to be the equivalent of the Canadian Entitlement, and the United States Entity, while those Agreements are in force, will succeed to all the rights of CSPE and its vendees to receive the entire Canadian Entitlement and all other rights of CSPE arising from this Agreement. CSPE therefore instructs the Authority, until otherwise notified, to make any compensation whether in power or money required to be made by the Authority pursuant to Section 6 or Section 7 of this Agreement to the United States Entity. CSPE agrees that any settlement of a claim for compensation or arrangement entered into pursuant to this Agreement by the United States Entity shall be binding on CSPE.

SECTION 11. PAYMENTS.

(1) The Authority shall pay any amount in United States funds determined to be due in accordance with the terms hereof within thirty days of receipt of an invoice for such amount.

(2) Should the Authority deliver power in excess of the amount required as compensation, then appropriate adjustments shall be made in kind or in money.

SECTION 12. APPROVALS.

No modification or renewal of this Agreement shall be effective until approved by the Governments of Canada and the United States of America, evidenced by an Exchange of Notes.

SECTION 13. DELIVERIES.

Any power delivered by the Authority pursuant to this Agreement shall be delivered at mutually acceptable points of interconnection on the Canadian-United States border. Appropriate adjustments shall be made to reflect transmission costs and transmission losses in the United States.

SECTION 14. NOTICES.

Any notices shall be in writing and shall be delivered or mailed prepaid as follows:

Columbia Storage Power Exchange,
20 N. Main Street
East Wenatchee, Washington, U.S.A.

United States Entity
c/o Bonneville Power Administration
P. O. Box 3621
Portland, Oregon 97208 U.S.A.

British Columbia Hydro and Power Authority
970 Burrard Street
Vancouver 1, British Columbia, Canada,

or such other address as may be signified by notice to the others.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the day and year first above written.

(SEAL)
Attest

_____

BRITISH COLUMBIA HYDRO
AND POWER AUTHORITY
By_____
Chairman
By_____
Secretary

(SEAL)
Attest

_____

COLUMBIA STORAGE
POWER EXCHANGE
By_____

The American Ambassador to the Canadian Secretary of State for External Affairs

EMBASSY OF THE
UNITED STATES OF AMERICA
Ottawa, September 16, 1964

No. 75

SIR,

I have the honor to refer to your note No. 140 of September 16, 1964, regarding the disposal of the Canadian entitlement to downstream power benefits in the United States, in accordance with Article VIII(1) of the Treaty between the United States of America and Canada relating to the cooperative development of the water resources of the Columbia River Basin, signed at Washington, January 17, 1961.

I wish to advise you that the Government of the United States of America has designated the Administrator of the Bonneville Power Administration, Department of the Interior, and the Division Engineer, North Pacific Division, Corps of Engineers, Department of the Army, as the United States Entity for the purposes of Article XIV(1) of the Treaty. A copy of the designation is attached to this note.

I wish also to advise that the Government of the United States of America confirms the proposals and understandings set forth in your note, and agrees that your note, together with this reply, shall constitute an agreement between our two Governments relating to the implementation of the provisions of the Treaty with effect from the date of the exchange of instruments of ratification of the Treaty.

Accept, Sir, the renewed assurances of my highest consideration.

W.W. BUTTERWORTH

Enclosure:
As stated.

The Honorable
PAUL MARTIN, P.C., Q.C.,
Secretary of State for External Affairs,
Ottawa.

EXECUTIVE ORDER No. 11177.
PROVIDING FOR CERTAIN ARRANGEMENTS UNDER THE COLUMBIA RIVER TREATY

WHEREAS the treaty between the United States and Canada relating to cooperative development of the water resources of the Columbia River Basin (signed at Washington, D.C., on January 17, 1961; Executive C, 87th Congress, 1st Session) has come into force; and

WHEREAS Article XIV of such treaty (hereinafter referred to as the Treaty) provides for the designation of certain entities which are empowered and charged with the duty to formulate and carry out the operating arrangements necessary to implement the Treaty, and authorizes the United States of America to designate one or more of such entities; and

WHEREAS Article XV of the Treaty authorizes the United States of America to appoint two members of the Permanent Engineering Board established by that Article:

NOW, THEREFORE, by virtue of the authority vested in me by the Treaty and by the Constitution and statutes, and as President of the United States, it is hereby ordered as follows:

PART I. UNITED STATES ENTITY

SECTION 101. Designation of Entity. The Administrator of the Bonneville Power Administration, Department of the Interior, and the Division Engineer, North Pacific Division, Corps of Engineers, Department of the Army, are hereby designated as an entity under Article XIV of the Treaty, to be known as the United States Entity for the Columbia River Treaty (hereinafter referred to as the Entity). The designated Administrator shall be the Chairman of the Entity.

SECTION 102. Functions of the Entity. The Entity shall have the functions set forth therefor in Article XIV, and in other provisions, of the Treaty.

SECTION 103. Departmental responsibilities. This order shall not affect (1) the respective responsibilities of the

Department of the Army and the Department of the Interior for project operation and administration, (2) the respective responsibilities of the Secretary of the Army and the Chief of Engineers for the supervision and direction of the Department of the Army and the Office of the Chief of Engineers, or (3) the responsibility of the Secretary of the Interior for the supervision and direction of the Department of the Interior.

PART II. UNITED STATES SECTION, PERMANENT ENGINEERING BOARD

SECTION 201. Appointment of members of the Permanent Engineering Board. (a) The Secretary of the Interior and the Secretary of the Army shall each appoint one person as a United States member of the Permanent Engineering Board established by Article XV of the Treaty.

(b) Each such person shall be selected from among appropriately qualified individuals, who at the time of appointment may be, but need not necessarily be, officers or employees of the United States, and shall serve as a member of the Board during the pleasure of the appointing Secretary.

SECTION 202. Alternate members. In addition to the two members to be appointed under the provisions of Section 201 of this order, there shall be two alternate United States members of the Permanent Engineering Board. The provisions of Section 201 of this order shall apply to the selection, appointment, and service of the alternate members.

SECTION 203. United States Section. The members and alternate members appointed under the foregoing provisions of this Part shall compose the United States Section, Permanent Engineering Board, Columbia River Treaty, hereinafter referred to as the United States Section. The member appointed by the Secretary of the Army under Section 201(a) of this order shall be the Chairman of the United States Section.

SECTION 204. Assistance to the United States Section. With the consent of the respective heads thereof, departments and agencies of the Federal Government may, upon the request of the United States Section and to the extent not inconsistent with law, furnish assistance needed by the Section in connection with the performance of its functions.

PART III. GENERAL

SECTION 301. Reservation. There is hereby reserved the right to modify or terminate any or all of the provisions of this order.

LYNDON B. JOHNSON

THE WHITE HOUSE

September 16, 1964

The Canadian Secretary of State for External Affairs to the American Ambassador

DEPARTMENT OF EXTERNAL AFFAIRS
CANADA

No. 141 OTTAWA, *September 16, 1964*

EXCELLENCY,

I have the honour to refer to my Note of January 22, 1964 addressed to the Honourable Dean Rusk, Secretary of State of the United States of America and the Protocol attached thereto regarding a Treaty between Canada and the United States of America relating to cooperative development of the water resources of the Columbia River Basin signed at Washington on 17 January, 1961 and to Mr. Secretary Rusk's reply of the same date. This Exchange of Notes relating to the carrying out of the provisions of the Treaty provides expressly that it shall come into effect from the date of the exchange of instruments of ratification of the Treaty.

The instruments of ratification of the Treaty having been exchanged on this 16th day of September 1964, I should like to propose that our two Governments confirm that the Intergovernmental Agreement set out in the said Exchange of Notes has now come into full force and effect. I should like to propose further that this Note together with your reply shall constitute an agreement between our two Governments with effect from this 16th day of September 1964.

Accept, Excellency, the renewed assurances of my highest consideration.

PAUL MARTIN
Secretary of State
for External Affairs

His Excellency,
W. WALTON BUTTERWORTH,
Ambassador of the United States
of America,
Ottawa.

The American Ambassador to the Canadian Secretary of State for External Affairs

EMBASSY OF THE
UNITED STATES OF AMERICA
Ottawa, September 16, 1964

No. 76

SIR,

I have the honor to refer to your Note No. 141 dated September 16, 1964 regarding the Treaty between Canada and the United States of America relating to cooperative development of the water resources of the Columbia River Basin signed at Washington on January 17, 1961. I wish to advise you that the Government of the United States of America confirms that the Exchange of Notes with Annex of January 22, 1964 referred to in your note has now come into full force and effect. The Government of the United States of America further agrees that your note together with this reply shall constitute an agreement between our two Governments relating to the carrying out of the provisions of the Treaty with effect from this 16th day of September 1964.

Accept, Sir, the renewed assurances of my highest consideration.

W.W. BUTTERWORTH

The Honorable
PAUL MARTIN, P.C., Q.C.,
Secretary of State for External Affairs,
Ottawa.

TREATY BETWEEN CANADA AND THE UNITED STATES OF AMERICA RELATING TO THE SKAGIT RIVER AND ROSS LAKE, AND THE SEVEN MILE RESERVOIR ON THE PEND D'OREILLE RIVER

Washington, April 2, 1984

TRAITE ENTRE LE CANADA ET LES ETATS-UNIS D'AMERIQUE CONCERNANT LA RIVIERE SKAGIT ET LE LAC ROSS, AINSI QUE LE RESERVOIR SEVEN MILE DE LA RIVIERE PEND D'OREILLE

Washington, le 2 avril 1984

TREATY BETWEEN CANADA AND THE UNITED STATES OF AMERICA RELATING TO THE SKAGIT RIVER AND ROSS LAKE, AND THE SEVEN MILE RESERVOIR ON THE PEND D'OREILLE RIVER

The Government of Canada and the Government of the United States of America,

Bearing in mind the purpose of the Boundary Waters Treaty, in particular with respect to the prevention of disputes between Canada and the United States regarding the use of boundary waters;

Recognizing the desirability of preserving the natural environment of the Skagit Valley, in the Province of British Columbia;

Acknowledging the importance to the economic growth and development of the City of Seattle of the electrical power that would have been produced by the raising of the Ross Dam;

Noting with approval the Agreement dated March 30, 1984 between the Province of British Columbia and the City of Seattle developed under the auspices of the International Joint Commission; and

Having encouraged the achievement of such a settlement and being desirous of securing and promoting the cooperative measures undertaken therein,

Have agreed as follows:

ARTICLE I

DEFINITIONS

For purposes of the Treaty:

(a) "Agreement" means the Agreement entered into between British Columbia and Seattle on March 30, 1984, and its several appendices, contained in the Annex to this Treaty;

(b) "Boundary Waters Treaty" means the Treaty between Great Britain and the United States relating to Boundary Waters and Questions Arising between Canada and the United States, dated January 11, 1909;

(c) "British Columbia" means the Province of British Columbia, Canada;

(d) "Seattle" means the City of Seattle, in the State of Washington, United States of America;

(e) "Normal full pool elevation" means the water level at the dam determined by means of measuring elevation above mean sea level, excluding variations due to wind and wave action on surface water and variations resulting from extraordinary flood conditions, and which in the case of Ross Lake is based on the City of Seattle Ross Dam datum for Ross Lake and in the case of the Seven Mile Reservoir is based on the Geodetic Survey of Canada datum for the Seven Mile Reservoir; and

(f) "Arbitration tribunal" means an arbitration tribunal established pursuant to section 10 and Appendix C of the Agreement.

ARTICLE II

AUTHORIZATIONS

1. (a) In the event that British Columbia discontinues its obligation to deliver electrical power to Seattle under the Agreement or an arbitration tribunal determines that conduct of British Columbia constitutes a material breach of the Agreement, Seattle is, in accordance with and subject to the terms and conditions specified in this Treaty and the Agreement, authorized to raise the level of Ross Lake on the Skagit River by means of construction and operation of Ross Dam to a normal full pool elevation of 1725.0 feet, subject to the terms and conditions contained in Opinion No. 808 of the United States Federal Power Commission issued July 5, 1977, Opinion No. 808A of the Federal Energy Regulatory Commission issued August 2, 1978, and in other actions of the Federal Energy Regulatory Commission in implementation thereof, including provisions for High Ross Dam in the relicensing by the Federal Energy Regulatory Commission of Seattle's Project No. 553, of which Ross Dam is a part.

(b) This authority is to be exercised by Seattle at its option, without regard to any United States law, decision, regulation or order which might be argued as limiting or negating this authority, including provisions of the Federal Power Act relating to the time in which project construction must otherwise commence or to the term of license, or any other provision, during the term of this Treaty, provided that full compensation to British Columbia in the event of operation of Ross Lake at a normal full pool elevation of 1725.0 feet shall be as provided for in the Agreement and in lieu of any conditions in Opinions 808 and 808A or in any licensing order or orders for Project No. 553 with respect to British Columbia, and provided further that unless and until the normal full pool elevation of Ross lake is thus raised, Seattle shall not be required to pay any increase in annual charges attendant thereupon under section 10(e) of the Federal Power Act.

2. The Government of Canada shall obtain the legislative or other authority necessary to enable British Columbia to export electrical power in accordance with the terms and conditions of the Agreement.

ARTICLE III

WATER LEVELS AT THE BOUNDARY

1. During the term of this Treaty, Seattle shall be permitted to operate Ross Lake so as to maintain the level of the Skagit River at the Canada-United States boundary at an elevation consistent with a normal full pool elevation of 1602.5 feet.

2. During the term of this Treaty, British Columbia shall be permitted to operate Seven Mile Reservoir so as to raise the level of the Pend d'Oreille River at the Canada-United States boundary to an elevation consistent with a normal full pool elevation of 1730.0 feet, subject to the delivery by British Columbia to Seattle of energy and capacity lost at Boundary Dam due to tailwater encroachment by the Seven Mile Reservoir.

3. In the event that Seattle discontinues its obligation under the Agreement to make payments to British Columbia for the delivery of electrical power or an arbitration tribunal determines that conduct of Seattle constitutes a material breach of the Agreement, Seattle shall not be permitted to operate Ross Lake so as to raise the level of the Skagit River at the Canada-United States boundary above a level consistent with a normal full pool elevation of 1602.5 feet.

4. In the event that British Columbia discontinues its obligation under the Agreement to deliver electrical power to Seattle or an arbitration tribunal determines that conduct of British Columbia constitutes a material breach of the Agreement, Seattle shall be permitted to operate Ross Lake so as to raise the level of the Skagit River at the Canada-United States boundary to an elevation consistent with a normal full pool elevation of 1725.0 feet.

5. In the event that either Seattle or British Columbia discontinues its respective obligations in accordance with paragraph 3 or paragraph 4 of this Article, or an arbitration tribunal determines that conduct of either constitutes a material breach of the Agreement, British Columbia nonetheless shall be permitted to operate Seven Mile Reservoir so as to maintain the level of the Pend d'Oreille River at the Canada-United States boundary at an elevation consistent with a normal full pool elevation of 1730.0 feet.

6. Notwithstanding paragraph 5 of this Article, in the event that British Columbia discontinues its obligation under the Agreement to deliver electrical power to Seattle or an arbitration tribunal determines that conduct of British Columbia constitutes a material breach of the Agreement, and the obligation of British Columbia to make payment under subparagraph 9(C)(iv) of the Agreement is not met, British Columbia shall not be permitted to operate Seven Mile Reservoir so as to maintain the level of the Pend d'Oreille River at the Canada-United States bound-

ary above a level consistent with a normal full pool elevation of 1715.0 feet.

ARTICLE IV

OBLIGATIONS ON DISCONTINUANCE

1. Canada and the United States shall ensure, in the manner set out in this Article, that financial obligations on the part of British Columbia and Seattle in the event of discontinuance of certain of their respective obligations under the Agreement, are met.

2. (a) In the event that British Columbia discontinues its obligation under the Agreement to deliver electrical power to Seattle or an arbitration tribunal determines that British Columbia is in material breach of the Agreement, Canada shall endeavor to ensure that British Columbia pays to Seattle any amount owing under subparagraph 9(C)(iv) of the Agreement. In the event that an arbitration tribunal determines the amount owed by British Columbia to Seattle under that subparagraph and that British Columbia has failed to discharge its obligation to pay that amount to Seattle, Canada shall pay such amount to the United States in United States currency.

(b) Payment of such amount by Canada shall be in full satisfaction of British Columbia's obligations under subparagraph 9(C)(iv) of the Agreement.

3. (a) In the event that Seattle discontinues its obligation under the Agreement to make payments to British Columbia, or an arbitration tribunal determines that Seattle is in material breach of the Agreement, the United States shall endeavor to ensure that Seattle pays to British Columbia any amount owing under Section 5 of the Agreement. In the event that an arbitration tribunal determines the amount owed by Seattle to British Columbia under that section and that Seattle has failed to discharge its obligation to pay that amount to British Columbia, the United States shall pay such amount to Canada in United States currency.

(b) Payment of such amount by the United States shall be in full satisfaction of Seattle's obligations under Section 5 of the Agreement.

ARTICLE V

TRANSMISSION OF POWER

The rate imposed by the Bonneville Power Administration, or its successor agency, for the transmission of power from British Columbia to Seattle pursuant to the Agreement shall be no greater than if the power were generated, and transmitted on the Federal Columbia River Power System, wholly within the State of Washington.

ARTICLE VI

EFFECT ON BOUNDARY WATERS TREATY

1. Nothing in this Treaty shall affect the application of the Boundary Waters Treaty except as provided in paragraph 2 of this Article.

2. During the period in which this Treaty is in force, the powers, functions and responsibilities of the International Joint Commission under Article IV, paragraph 1 and Article VIII of the Boundary Waters Treaty shall not apply to the Skagit River and Ross Lake or to the Pend d'Oreille River and the Seven Mile Reservoir.

ARTICLE VII

AMENDMENT OF THE AGREEMENT

Amendments to the Agreement proposed by British Columbia and Seattle shall be submitted to the Parties for timely review. Amendments that, in the view of either Party, would affect the rights and obligations of the Parties under the Treaty shall enter into force only upon an exchange of notes between the Parties. All other amendments shall enter into force as agreed upon between British Columbia and Seattle.

ARTICLE VIII

ENTRY INTO FORCE AND DURATION

This Treaty shall enter into force on the date the Parties exchange instruments of ratification, and shall remain in

force until terminated by agreement of the Parties, or by either Party upon not less than twelve months written notice which may be given no earlier than January 1, 2065.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Treaty.

DONE at Washington in duplicate, in the English and French languages, both texts being equally authentic, this second day of April, 1984.

FOR THE GOVERNMENT OF CANADA:

/s/ ALLAN J. MACEACHEN

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

/s/ GEORGE P. SCHULTZ

MEMORANDUM

December 18, 1984

To: Randy Hardy, Mac Macdonald, John Saven, Kathy Fletcher, Jerry Gorman, May Gerstle, C. T. Rochey, Del Mercure

From: Arthur T. Lane

Subject: Ratification for the Skagit River Treaty

This will advise you that on Friday, December 14, 1984 instruments of ratification for the Skagit River Treaty were exchanged in Ottawa between John Fraser, Minister of Fisheries for Canada, and Ambassador Robinson for the U.S.A. This means that the Treaty and all associated contracts, including the B.C.-Seattle agreement, and the indemnification agreements between the Province and Canada and between Seattle and the federal government, are now in full force and effect.

NORTH AMERICAN FREE TRADE AGREEMENT
BETWEEN
THE GOVERNMENT OF THE UNITED STATES OF AMERICA,
THE GOVERNMENT OF CANADA
AND
THE GOVERNMENT OF THE UNITED MEXICAN STATES

[Done at Washington on December 8 and 17, 1992,
at Ottawa on December 11 and 17, 1992
and at Mexico City on December 14 and 17, 1992]

* * * * *

PART FIVE
INVESTMENT, SERVICES, AND RELATED MATTERS
Chapter Eleven
Investment
Section A – Investment

* * * * *

Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, of the Party of which it forms a part.

4. For greater certainty, no Party may:

   (a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or

   (b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

Article 1103: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

* * * * *

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1441 provides:

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if –

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determi-

nation of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1442 provides:

§ 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603, provides:

§ 1603. Definitions

For purposes of this chapter –

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605, provides:

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

. (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a

foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if

such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph –

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if –

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That –

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or

cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in

the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a) –

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on Discovery. –

(1) In general. – (A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the

Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset. – (A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would –

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence. – The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss. – A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction. – Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

No. 5

CONSTITUTION ACT, 1867

(*THE BRITISH NORTH AMERICA ACT, 1867*)

[Note: The present short title was substituted for the original short title (in italics) by the *Constitution Act, 1982* (No. 44 *infra*).]

30 & 31 Victoria, c. 3 (U.K.)

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith

[29th March 1867]

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:

Be it therefore enacted and declared by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

[Note: The enacting clause was repealed by the *Statute Law Revision Act, 1893* (No. 17 *infra*).]

* * * * *

VIII. REVENUES; DEBTS; ASSETS; TAXATION

* * * * *

Exemption of public lands, etc.

125. No lands or property belonging to Canada or any Province shall be liable to Taxation.

* * * * *

HYDRO AND POWER AUTHORITY ACT
[R.S.B.C. 1996] CHAPTER 212
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Definitions

1 In this Act:

"authority" means the British Columbia Hydro and Power Authority continued under this Act;

"commission" means the British Columbia Utilities Commission continued under the *Utilities Commission Act*;

"generation" means production by hydraulic, electrical, steam, internal combustion engine, gas, oil or by any other process;

"judge" means a justice of the Court of Appeal or a judge of the Supreme Court;

"owner"

(a) in relation to land, means a person registered in the books of a land title office as owner of land or of a charge on land, whether entitled to it in the person's own right or in a representative capacity or otherwise and includes a lessee in possession for a term of 3 years or

less and a person who is the owner, although unregistered, of an estate less than the fee simple granted by the Crown, and

(b) in relation to other property, includes a mortgagee, person entitled to a limited estate or interest and a guardian, executor, administrator or trustee in whom any property or interest in any property is vested;

"power" includes energy, light and heat however developed or produced, and includes electricity and natural, manufactured or mixed gas, or liquefied petroleum gas;

"power plant" or **"plant"** includes all land, water, rights to the use of water, buildings, works, machinery, installations, materials, devices, fittings, apparatus, appliances, offices, furniture and equipment, vehicles, tools, stores and supplies, including office stores and supplies, constructed, acquired or used or adapted, or that, in the opinion of the authority, might be used or adapted for or in connection with the generation or supply of power;

"power project" includes any charter, franchise, privilege or other right, or land, buildings, plant, machinery or equipment acquired, or proposed to be acquired, by a person with a view to the generation or supply of power, or any plans, surveys or data made or assembled with a view to the generation or supply of power;

"power site" includes any land, or any lake, river, stream, watercourse or body of water, water licence or privilege, or reservoir, dam, water storage, sluice, canal, raceway, tun-

nel or aqueduct that is used or that, in the opinion of the authority, might be used for or in connection with the generation or supply of power;

"supply" as a noun means reservation, transmission, distribution, capacity to provide, dealing in and sale; and as a verb has a corresponding meaning.

Authority continued

2 The corporation known as the British Columbia Hydro and Power Authority is continued, consisting of persons who are appointed as directors and who hold office as provided in this Act.

Agent of government

3 (1) The authority is for all its purposes an agent of the government and its powers may be exercised only as an agent of the government.

(2) The Minister of Finance and Corporate Relations is the fiscal agent of the authority.

(3) The authority, on behalf of the government, may contract in its corporate name without specific reference to the government.

Directors

4 (1) The Lieutenant Governor in Council appoints the directors of the authority who hold office during pleasure.

(2) The Lieutenant Governor in Council must appoint one or more of the directors to chair the authority.

(3) A chair or other director must be paid by the authority the salary, directors' fee and other remuneration the Lieutenant Governor in Council determines.

Powers of directors

5 The directors must manage the affairs of the authority or supervise the management of those affairs, and may

(a) exercise the powers conferred on them under this Act,

(b) exercise the powers of the authority on behalf of the authority, and

(c) delegate the exercise or performance of a power or duty conferred or imposed on them to anyone employed by the authority.

* * * * *

Executive committee

9 (1) The Lieutenant Governor in Council may appoint an executive management committee of the authority that is composed of not more than 5 directors, and that must, subject to the direction of the directors of the authority, manage the operations of the authority.

(2) The members of the executive management committee may be paid remuneration determined by the Lieutenant Governor in Council.

Appointment of employees

10 The authority may, without regard to the *Public Service Act*, appoint a secretary and executive officers, engineers, solicitors, accountants, employees, consultants and agents it thinks necessary for its business, and may define their duties, determine their compensation and provide a system of organization to establish responsibility and promote efficiency.

* * * * *

Powers

12 (1) Subject to the approval of the Lieutenant Governor in Council, which may be given by order of the Lieutenant Governor in Council, the authority has the power to do the following:

(a) generate, manufacture, distribute and supply power;

(b) develop power sites, power projects and power plants;

(c) act as a carrier of passengers and freight;

(d) flood and overflow land, purchase, otherwise acquire, accumulate and store water, raise or lower the level of rivers, lakes, streams and other bodies of water, and purchase and otherwise acquire water records and water privileges;

(e) manufacture and deal in all articles and things required for exercising the powers and duties of the authority;

(f) acquire, maintain, develop, replace, alter, administer, manage, operate and dispose of property;

(g) build, make, construct and establish every kind of structure, excavation or installation and install every kind of equipment or facility;

(h) acquire and protect, prolong and renew patents, patent rights, trade marks, designs, licences, franchises, concessions, and use, exercise, develop, manufacture under or grant licences or privileges in respect of those acquisitions and experiment with, test and improve patents, rights, inventions, discoveries, processes or information;

(i) require a person who owns, operates or controls a power site, power project or power plant to furnish to the authority, within the time specified in the demand, the particulars specified in the demand of the power site, power project or power plant;

(j) apply for and obtain and exercise any franchise, licence, right or privilege that may be conferred or obtained under any Act of Canada or of any province;

(k) acquire in accordance with a statute relating thereto the right to enter on roads, highways, railways, rivers, streams, waterways and other public places to erect on, over or under any of them anything for the generation or supply of power;

(*l*) integrate existing power plants;

(m) purchase power from or sell power to a firm or person;

(n) purchase, subscribe for, underwrite, guarantee the subscription of and otherwise acquire and deal in, sell and dispose of stock, shares, bonds, debentures, debenture stock, notes, securities and evidences of indebtedness, of any corporation and any stocks, funds and securities of any government, municipality or other authority;

(o) acquire or lease all or part of the property, assets and undertaking, and assume any of the obligations and liabilities of a firm or person carrying on or entitled to carry on any activities that the authority is authorized to carry on or that can be carried on incidental to or in connection with the exercise of the powers and duties of the authority;

(p) assume duties and obligations of a firm or person, reimburse others for payments made and liabilities incurred and indemnify others against liabilities;

(q) issue securities in exchange for obligations assumed by the authority or in exchange for securities of any other firm or person representing those obligations, and enter into any covenants or agreements considered necessary or desirable for that purpose;

(r) amalgamate in any manner with or enter into partnership with a firm or person;

(s) enter into a working arrangement with or cooperate with a firm or person carrying on or proposing to carry on an activity that the authority is empowered to carry on;

(t) by agreement or otherwise, take part in or take over all or part of the management, supervision or control of the business or operations of a firm or person;

(u) enter into agreements with a firm or person for any of the purposes of this Act;

(v) finance the operations of a corporation that has powers the exercise of which, in the opinion of the directors, would be beneficial to the authority;

(w) do immediately anything referred to in this section in contemplation of future requirements;

(x) do anything necessary or desirable for carrying out any of the powers and purposes in this section;

(y) exercise any of the powers in section 22 of the *Companies Act*, R.S.B.C. 1960, c. 67.

(2) If the authority

(a) acquires all of the property, assets or undertaking of a firm or person,

(b) assumes the obligations and liabilities of a firm or person,

(c) amalgamates in any manner with or enters into partnership with a firm or person, or

(d) takes over the management, supervision or control of the business of a firm or person,

the authority or the amalgamated corporation, if there is an amalgamation, may exercise and perform any power or duty conferred or imposed

on it or on that other firm or person under this or any other Act for and on behalf of that other firm or person, or the amalgamated corporation, or with respect to the property or undertaking of that other firm or person, or the amalgamated corporation, with or without exercising or performing any other resulting power or duty.

(3) If the authority amalgamates with or enters into partnership with a firm or person, this Act applies as if the amalgamated corporation or the partnership were the authority.

(4) The Lieutenant Governor in Council may, by order, prescribe the procedure to be followed in amalgamation of the authority with a firm or person.

(5) If the authority acquires all of the property, assets or undertaking of or amalgamates in any manner with or enters into partnership with a firm or person, then despite the *Land Title Act*, all of the interests of that firm or person registered in a land title office are deemed to be registered interests of the authority, or the amalgamated corporation, or the partnership, as the case may be, and the registrar must accordingly make all necessary amendments to the register, and the amendments constitute registration under the *Land Title Act* in favour of the authority, the amalgamated corporation or the partnership, as the case may be.

(6) The Lieutenant Governor in Council may make regulations necessary for carrying out subsection (5).

(7) Fees must not be paid for anything done under subsection (5) or (6).

(8) Nothing in this section relieves the authority from any requirement of the *Utilities Commis-*

sion Act that applies to the authority under section 32 (7).

(9) The Lieutenant Governor in Council, by order, may designate any agreement entered into or to be entered into by the authority that the Lieutenant Governor in Council considers relates to the provision of support services to or on behalf of the authority.

(10) For the purposes of subsection (9), "support services" means services that support or are ancillary to the activities of the authority from time to time, and includes services related to metering for, billing and collecting fees, charges, tariffs, rates and other compensation for electricity sold, delivered or provided by the authority, but does not include the production, generation, storage, transmission, sale, delivery or provision of electricity.

(11) Despite the common law and the provisions of this or any other enactment, if an agreement is designated under subsection (9),

(a) the authority is deemed to have, and to have always had, the power and capacity to enter into the agreement,

(b) the agreement and all actions of the authority taken in accordance with the provisions of the agreement are authorized, valid and deemed to be required for the public convenience and necessity,

(c) the authority is deemed to have, and to have always had, the power and capacity to carry out all of the obligations imposed under, and to exercise all of the rights, powers and privileges granted by, the agreement according to its terms,

(d) the agreement is binding on and enforceable by the authority, according to the agreement's terms, and

(e) subject to subsection (12), the authority is not required to obtain any approval, authorization, permit or order under the *Utilities Commission Act* in connection with the agreement or any actions taken in accordance with the terms of the agreement, and the commission must not prohibit the authority from taking any action that the authority is entitled or required to take under the terms of the agreement.

(12) Nothing in subsection (11)(e) precludes the commission from considering the costs incurred, or to be incurred, in relation to an agreement designated under subsection (9) when establishing the revenue requirements and setting the rates of the authority.

(13) Subsections (3) and (5) do not apply to any partnership created by, under or in furtherance of an agreement designated under subsection (9).

* * * * *

Expropriation

16 (1) The authority may, for any purpose related to the exercise of its powers,

(a) expropriate any property, power site, power project or power plant,

(b) enter, remain on, take possession of and use any property,

(c) on land that it expropriates,

(i) erect, make or place on the land any structure, installation, excavation or power plant, and

(ii) flood and overflow the land and accumulate and store water on it, and

(d) require and compel a person who generates or supplies power to enter into an agreement to supply to the authority as much of that power as the authority requires.

(2) If land is expropriated under subsection (1), the *Expropriation Act* applies.

(3) If the authority exercises a power under subsection (1) that does not constitute the expropriation of land requiring approval under the *Expropriation Act*, it must obtain the approval of the minister before the power is exercised.

(4) If the authority expropriates property under subsection (1) other than land, the authority must notify the Attorney General and, if required by the Attorney General, file a notice describing the property at a place designated by the Attorney General.

(5) Despite any other Act, the property referred to in subsection (3) that is expropriated vests in the authority free and clear of all encumbrances

(a) when the notice is filed under subsection (4), or

(b) if no filing is requested, when the Attorney General receives the notification under subsection (4).

(6) After property vests under subsection (5), the authority must serve on the owner of the property a notice containing a description of the property sufficient to identify it, together with a declaration of readiness to pay compensation in an amount to be agreed on or to be determined under subsection (9).

(7) If an owner is absent from British Columbia or is unknown or cannot be served, the Supreme Court may, on the application of the authority,

order that the notice under subsection (6) be published in a manner and for a time that the court thinks proper, and, on publication, the owner is deemed to have been served with the notice.

(8) If the authority exercises its powers under subsection (1), other than in relation to the expropriation of land, it must pay compensation for

(a) the interest, property, matter or thing expropriated, entered on or used, and

(b) damages to any property that directly result from the expropriation, entry or use.

(9) If the authority and a person entitled to compensation fail to agree on the amount of compensation payable under subsection (8), the amount must be determined by the Expropriation Compensation Board established under the *Expropriation Act*.

Compulsory supply of power

17 (1) If the authority is unable to agree with a person required or compelled to supply power under section 16 (1) (d) on the amount of power available for the authority's use or the price to be paid for it or on any matter relating to supplying the power desired, the commission must, on application of either party, after a hearing, determine the amount of power, if any, to be supplied and the price to be paid for it, and also any other matter on which agreement has not been reached.

(2) A determination of the commission under subsection (1) is final.

* * * * *

Borrowing by authority

21 (1) Subject to the approval of the Lieutenant Governor in Council and within the borrowing limi-

tation set out in section 25, the authority, for any of the purposes of the authority, may

(a) borrow sums of money the authority thinks are required, and

(b) issue notes, bonds, debentures and other securities bearing interest at rates and payable as to principal and interest in currencies and at places and at times and in a manner the authority determines.

(2) The directors of the authority may, by resolution, delegate any of their powers or the powers of the authority under this section to any director or officer of the authority.

(3) A resolution under this section approved by the required number of directors by telex, telegraph, telephone or any other similar means of communication confirmed in writing or other graphic communication, is as valid and effectual as if it had been passed at a meeting of the directors properly called and constituted.

(4) The notes, bonds, debentures and other securities of the authority may be made redeemable in advance of maturity at times and at prices the directors of the authority determine at the time of the issue.

(5) For this section, the purposes of the authority, without limiting any other provision of this Act, include the following:

(a) payment, refunding, exchange or renewal of all or any part of a loan raised or securities issued by the authority, except to the extent that a sinking fund is available for the payment of the loan or securities, and a recital or declaration in the resolution or minutes of the authority authorizing the issue of securities as to the amount of any

sinking fund so available is conclusive evidence of the fact;

(b) payment of all or any part of a loan, liability or bonds, debentures or other securities, payment of which is guaranteed or assumed by the authority;

(c) payment of any other liability or indebtedness of the authority;

(d) carrying out any of the powers referred to in this Act, providing in whole or in part for expenditures of the authority made or to be made in connection with them, reimbursing the authority for any of those expenditures and repaying all or part of any temporary borrowings of the authority for any of those purposes;

(e) the exercise of a power, right, function or duty conferred or imposed on the authority by or under this or any other Act or law.

(6) The authority may borrow and may issue under subsection (1) in amounts that will realize the net sum required by the authority for its purposes, and a recital or declaration in the resolution or minutes of the authority authorizing the issue of securities to the effect that the issue of the authorized securities is being made for the purposes of the authority and that the amount is necessary to realize the net sum required for the purposes of the authority is conclusive evidence of the fact.

(7) Subject to the approval of the Lieutenant Governor in Council, on terms and conditions thought advisable, the authority may dispose of the notes, bonds, debentures and other securities of the authority, either at the par value of them or at less or more than the par value, and may charge, pledge, hypothecate, deposit or oth-

erwise deal with the securities as collateral security.

(8) Subject to the approval of the Lieutenant Governor in Council on terms and conditions thought advisable, the authority may exchange notes, bonds, debentures or other securities of the authority for securities of another corporation

(a) in an amount or amounts equal to or greater or smaller than the amount or amounts of the notes, bonds, debentures or other securities of the authority,

(b) bearing interest payable at the same or different time or times as the interest payable under the notes, bonds, debentures or other securities of the authority,

(c) bearing interest at the same or a greater or smaller rate as or than the interest payable under the notes, bonds, debentures or other securities of the authority,

(d) due on the same or on an earlier or later date as or than the notes, bonds, debentures or other securities of the authority, and

(e) callable whether or not the notes, bonds, debentures or other securities of the authority are callable and on the same or different terms and conditions as or than the notes, bonds, debentures or other securities of the authority if they are callable.

* * * * *

(10) The notes, bonds, debentures and other securities of the authority must be in a form determined by the directors of the authority or on behalf of the authority by the Minister of Finance and Corporate Relations as fiscal agent for the authority.

* * * * *

(14) Subject to the approval of the Lieutenant Governor in Council and within the borrowing limitation set out in section 25, the authority may also borrow by way of temporary loans from any person the sums on the terms, for the purposes and on the conditions the directors of the authority determine, by way of bank overdraft or line of credit, or by the pledging as security for the temporary loans of notes, bonds, debentures or other securities of the authority pending the sale of them or in place of selling them, or in whatever other manner the directors of the authority determine.

* * * * *

(16) The Minister of Finance and Corporate Relations, as fiscal agent of the authority, may arrange all details and do, transact and execute all deeds, matters and things that are required during the negotiation of a loan or for placing a loan.

(17) Money raised by the authority under this section must be paid by the authority into the fund established under section 27.

(18) The authority, except in the case of temporary loans of a term not exceeding 5 years and of issues of securities repayable in installments of principal, must set aside a sum that, together with interest compounded annually on it at a rate determined by the Lieutenant Governor in Council, would be sufficient, irrespective of the date or dates of maturity of the securities being issued, to provide a sinking fund for the repayment in full of any securities issued by the authority

(a) within a period not exceeding 50 years from the date of them, or

(b) in the case of securities issued by the authority under subsection (5)(a) other than for repaying or renewing a temporary loan in whole or in part, within a period not exceeding 50 years from the date of original issue of the securities being repaid, refunded or renewed.

* * * * *

(20) The sum referred to in subsection (18) must be paid to the Minister of Finance and Corporate Relations, who must

(a) act as trustee for the authority,

(b) establish one or more appropriate sinking fund trustee accounts, and

(c) subject to subsection (21), invest that sum and the interest earned on it in investments permitted for a trust fund under section 40 (4) of the *Financial Administration Act*.

* * * * *

Authorization to borrow from Canada Pension Plan

22 Despite anything in this Act, the authority may, in the bylaw or resolution under section 21, authorize the Minister of Finance and Corporate Relations or, with the concurrence of the Minister of Finance and Corporate Relations, authorize the Minister of Finance of Canada to determine any matter required to be determined under section 21 for

(a) borrowing money from the Canada Pension Plan Investment Fund established under the Canada Pension Plan, and

(b) issuing and selling to the Receiver General and Minister of Finance of Canada for the credit of the Canada Pension Plan Invest-

ment Fund debentures as security for the loans.

Guarantee of principal and interest

23 (1) The Lieutenant Governor in Council, for and on behalf of the government, may guarantee the payment of the principal and interest of and on any of the following:

(a) notes, bonds, securities, debentures, debenture stock, loans or obligations issued by the authority or the payment of which is assumed by the authority;

(b) notes, bonds, securities, debentures, debenture stock or loans issued by a firm or person if

(i) all of the property, assets or undertaking of the firm or person has been acquired by the authority,

(ii) the obligations and liabilities of the firm or person has been assumed by the authority,

(iii) the firm or person is amalgamated with the authority, or

(iv) the management, supervision or control of the business of the firm or person has been taken over by the authority.

* * * * *

Guarantees respecting leases

24 (1) The government may, on terms approved by the Lieutenant Governor in Council, guarantee payments of the authority under a lease made by or to the authority.

(2) The Lieutenant Governor in Council may authorize

(a) the Minister of Finance and Corporate Relations, or

(b) an officer of the Ministry of Finance and Corporate Relations,

to sign the guarantee on behalf of the government, and the signature of that person on the guarantee is conclusive proof that this section has been complied with.

(3) Money required to be paid by the government in respect of a guarantee given under this section must be paid out of the consolidated revenue fund without an appropriation other than this Act.

* * * * *

Examination and report by Comptroller General

28 (1) The Minister of Finance and Corporate Relations may direct the Comptroller General of British Columbia to examine and report to the Treasury Board on any or all of the financial and accounting operations of the authority.

(2) The accounts of the authority must at least once in every year, be audited and reported on by an auditor or auditors appointed by the Lieutenant Governor in Council, and the costs of the audit must be paid by the authority.

(3) The Lieutenant Governor in Council must appoint the auditors and the bankers of the authority, who hold office during pleasure.

Annual report

29 (1) The authority must make to the Lieutenant Governor in Council an annual report containing clear and comprehensive financial statements made up to March 31 last preceding.

(2) If the Legislature is then in session, the report must be laid before it at once, otherwise within 15 days after the opening of the next session.

(3) The *Financial Information Act* applies to the authority.

Liability of authority

30 (1) The authority may sue and be sued in its own corporate name for any right or obligation acquired or incurred by it on behalf of the government as if the right or obligation had been acquired or incurred on its own behalf and also in respect of any liabilities in tort to which it is made subject by this Act.

(2) The authority is liable in tort for the damages for which if it were a private person of full age and capacity it would be subject

(a) for torts committed by its servants or agents, and

(b) for a breach of duty that attaches to the ownership, occupation, possession or control of property.

(3) An action or other proceeding does not lie against the authority or against a servant or agent of the authority or against the government for

(a) any claim against the authority or a servant or agent of the authority if a pension or compensation has been paid or is payable out of the consolidated revenue fund or out of any funds administered by an agent of the government for the death, injury, damage or loss in respect of which the claim is made, or

(b) an act or omission of a servant or agent of the authority unless the act or omission would, apart from this section, have given rise to a cause of action in tort against that servant or agent or his or her personal representative.

(4) In all proceedings to which the authority is a party, the court may pronounce a judgment or

make an order or direction as to costs in favour of or against the authority.

Nuisance actions

31 Despite section 30, the authority is not liable in an action based on nuisance or on the rule in Rylands v. Fletcher, unless the authority was negligent.

Application of other statutes

32 (1) Despite any specific provision in any Act to the contrary, except as otherwise provided by or under this Act, the authority is not bound by any statute or statutory provision of British Columbia.

(2) The authority is an employer under the *Workers Compensation Act*.

(3) Money owing, payable or accruing due from the authority as salary or wages to any of its members or employees may be attached under the *Court Order Enforcement Act* the same as money owing, payable or accruing due from any person to the Crown, and for that purpose that Act applies to the authority.

(4) Money, as defined in section 25 of the *Family Maintenance Enforcement Act*, that is owing, payable or accruing due from the authority to any of its members or employees may be attached or garnished under section 15, 18 or 24 of that Act, and that Act applies to the authority.

(5) Service of all orders, notices and processes required to be served on the authority as garnishee or attachee must be effected by personal service on the secretary of the authority or by leaving the document or documents at the secretary's office.

(6) The Lieutenant Governor in Council may, by regulation, make applicable to the authority any statutory provision.

(7) The following Acts and provisions apply to the authority:

(a) the *Auditor General Act*;

(b) [Repealed 1998-30-93.]

(b.1) the *Budget Transparency and Accountability Act*;

(c) section 128 of the *Company Act*;

(d) [Repealed 2001-30-16.]

(e) the *Debtor Assistance Act*;

(f) [Repealed 2003-46-22.]

(g) the *Employment Standards Act*;

(h) the *Environmental Assessment Act*;

(i) the *Environment Management Act*;

(j) the *Expropriation Act*;

(k) sections 4.1, 52 to 55, 77 and 79 of the *Financial Administration Act*;

(*l*) the *Forest Act*;

(m) the *Geothermal Resources Act*;

(m.1) the *Greater Vancouver Transportation Authority Act*;

(n) the *Heritage Conservation Act*;

(o) the *Human Rights Code*;

(p) the *Insurance (Motor Vehicle) Act*;

(q) the *Labour Relations Code*;

(r) the *Limitation Act*;

(s) the *Ombudsman Act*;

(s.1) the *Pension Benefits Standards Act*;

(t) the *Pesticide Control Act*;

(u) the *Petroleum and Natural Gas Act*;

(v) the *Property Transfer Tax Act*;

(v.1) the *Public Sector Employers Act*;

(w) sections 3 and 5 of the *Railway Act*;

(x) the *Utilities Commission Act*, except sections 50, 51 (c), 52, 57 (2), 95 and 98;

(y) the *Waste Management Act*;

(z) sections 1 to 26, 29, 31 to 42, 44, 45, 46, except subsection (2) (c), and 47 to 49 of the *Water Act*.

(8) The *Transmission Corporation Act* applies to the authority in the manner and to the extent contemplated by that Act.

* * * * *

Taxation

34 (1) With the approval of the Lieutenant Governor in Council, the authority may make annual grants to the Surveyor of Taxes with respect to a rural area and to municipalities and other local governments within the territorial jurisdiction of which the authority generates, transmits or sells electric power or otherwise carries on business.

(2) Except as provided by order of the Lieutenant Governor in Council, land and improvements of the authority as defined by the *School Act* must be included for the calculation of Provincial grants to school districts and the net taxable value of land and improvements of the authority as defined in the *School Act* must be assessed and taxed in each year.

(3) An order of the Lieutenant Governor in Council under subsection (2) may be made for any period, whether before, on or after, or partly before and partly after April 6, 1968.

Directives

35 Despite the *Utilities Commission Act*, the Lieutenant Governor in Council may issue directives directing the authority in a fiscal year to pay to the government an amount specified in the directive and may issue directives directing the authority in a fiscal year to pay to the persons constituting one or more classes of the authority's past or present customers an amount specified in the directive.

Pension arrangements

36 (1) With the approval of the Lieutenant Governor in Council, the authority may

(a) establish and maintain a fund for the payment of superannuation allowances or allowances on the death or disability of directors and employees,

(b) make regulations providing for

(i) contributions to the fund by the authority and directors and employees,

(ii) the terms and conditions on which superannuation allowances or other allowances may be payable, and

(iii) the persons to whom allowances may be paid,

(c) make regulations providing for

(i) the continuation or amendment of existing superannuation or retirement plans or arrangements or for the integration of former plans with any plan established under this section,

(ii) meeting or removing any difficulty arising out of the concurrent administration of the plan established under this section and the plan or plans in effect

at the time that subparagraph (i) becomes effective, and

(iii) preserving and giving effect to the rights of all persons accrued or accruing under former plans,

and the regulations may be applicable generally or to particular cases, and

(d) [Repealed 1999-44-61.]

(e) amend any regulation made under this section.

(2) Despite this or any other Act, the matters respecting the establishment and maintenance of a fund for the payment of superannuation allowances or allowances on the death or disability of directors or employees under subsection (1), including

(a) contributions to the fund by the authority and directors and employees,

(b) the terms and conditions on which superannuation allowances or other allowances may be payable, and

(c) the persons to whom allowances may be paid,

must not be the subject of a collective agreement between the authority and its employees.

(3) Despite subsection (1), the regulations for a superannuation plan may provide for payment to the authority from the amount standing to the credit of a contributor or former contributor sums necessary to make good any default in accounting for any money belonging to the authority that was entrusted to the contributor or any debt that may be due by the contributor to the authority.

(4) If a contributor dies while in the service of the authority, a payment from the fund to a person

nominated by the contributor or to the contributor's spouse is not subject to the control of the creditors of the contributor and does not form part of the contributor's estate.

(5) Despite any requirement or agreements existing and applicable to any superannuation or retirement plan or scheme for the benefit of any officers or employees of the authority or corporation formed by amalgamation under this Act or a partnership formed under this Act, the Lieutenant Governor in Council may rescind the appointment of any trustee under any plan or scheme and appoint a trustee or trustees in place of that trustee.

(6) The trustee appointed by the Lieutenant Governor in Council under subsection (5) need not be a trust company.

* * * * *

Power to make regulations

38 The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

POWER FOR JOBS DEVELOPMENT ACT
CHAPTER 51

Assented to July 30, 1997

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16 Commencement

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

PART 1 — INTRODUCTORY PROVISIONS

Definitions

1 In this Act:

"administrator" means an officer or employee of the ministry or of a government body, within the meaning of the Financial Administration Act, designated as the Power for Jobs Administrator by the minister;

"authority" means the British Columbia Hydro and Power Authority and includes a subsidiary of the British Columbia Hydro and Power Authority;

"business" means an individual, partnership, corporation or other organization carrying on, in British Columbia, a trade, enterprise, calling or undertaking or preparing to do so;

"Canadian entitlement" means the Canadian share of downstream power benefits as determined under Article VII of the Treaty between Canada and the United States of America relating to Cooperative Development of the Water Resources of the Columbia River Basin;

"customer" means a business that, for the operation of a plant or for any other economic activity, purchases electricity in an amount that exceeds 35 kW annually;

"development power rate" means

(a) a rate that is payable to the authority or the government by a business in respect of which an order is made under section 3 for one or both of surplus electricity and the delivery of that surplus electricity, or

(b) a rate that is payable to a public utility or to a municipality or regional district by a business in respect of which an order is made under section 6 for one or both of

surplus electricity and the delivery of that surplus electricity;

"Job Protection Commissioner" means the Job Protection Commissioner appointed under the *Job Protection Act*;

"public utility" has the same meaning as in the *Utilities Commission Act*;

"rate" includes

(a) a general, individual or joint rate, fare, toll, charge, rental or other compensation of a public utility or of the government,

(b) a rule, practice, measurement, classification or contract of a public utility, the government or a corporation relating to a rate, and

(c) a schedule or tariff respecting a rate;

"supply" includes wheeling by the authority of surplus electricity that is a portion of the Canadian entitlement;

"surplus electricity" means electricity that is one or both of the following:

(a) surplus to the authority's requirements to supply

(i) customers in the authority's service area, and

(ii) electricity in respect of which removal is permitted under the *Utilities Commission Act* and that is either

(A) produced at a hydroelectric generating facility owned by the authority, or

(B) purchased by the authority from another source;

(b) a portion of the Canadian entitlement that the Lieutenant Governor in Council de-

termines may be made available from time to time for the purpose of this Act.

Purpose

2 The purpose of this Act is to help ensure that British Columbia's electric power resources contribute to the creation and retention of jobs in British Columbia and to regional economic development.

PART 2 — PROVISION OF ELECTRICAL POWER

Development power rates

3 On application by any business and despite the rate charged by the authority for the supply of electricity to the business, the Lieutenant Governor in Council may order that surplus electricity be supplied to, and a development power rate applies to some or all of the supply of electricity to, that business if the application is consistent with the criteria prescribed under section 15(2)(a) and if

(a) the business proposes to construct or expand a plant or to expand operations in the authority's service area, the proposed plant or expansion will have the effect of expanding employment and the business would, after completion of the plant or expansion, fall within the definition of "customer", or

(b) the business is a customer that requires financial assistance to maintain

(i) the ongoing viability of the business's plant or operations, and

(ii) the continued employment of persons.

Considerations of Lieutenant Governor in Council

4 Before making an order under section 3 or 6 in respect of a business, the Lieutenant Governor in Council may consider any recommendations made

by the administrator in relation to the business' application.

Terms of orders

5 An order in relation to a business under section 3 or 6 may contain terms that the Lieutenant Governor in Council considers advisable, including, without limitation, terms

(a) specifying the amount of surplus electricity that is to be supplied to the business and the amount of that surplus electricity that is to be supplied at a development power rate,

(b) setting the development power rate for the surplus electricity to be supplied to the business, and

(c) specifying the period or periods during which the surplus electricity is to be supplied or the development power rate is to be applicable.

Customers outside the area of the authority

6 (1) On application by a business, the Lieutenant Governor in Council may, by order, authorize the authority to dispose of surplus electricity to another public utility to enable the public utility to supply electricity to the business for the purpose of a plant or operations if

(a) the plant is or the operations are located in the service area of that public utility, and

(b) the business would be eligible for an order under section 3 were the plant or operations located in the service area of the authority.

(2) If electricity is supplied to a public utility under subsection (1), the Lieutenant Governor in Council may order that the public utility supply some or all of the electricity to that business at a development power rate.

(3) If a municipality or regional district supplies electricity to customers within its own boundaries, an order may be made under subsections (1) and (2) in respect of that service as though the municipality or regional district were a public utility referred to in subsection (1).

Effect of development power rates

7 (1) If there is a conflict between the rates of the authority and an order made under section 3 or 6, the order prevails.

(2) A development power rate that is payable in accordance with the terms of an order made under section 3 or 6 is applicable, despite sections 61(3) and 63 and Part 5 of the *Utilities Commission Act*.

(3) The British Columbia Utilities Commission does not have jurisdiction under section 58(1) and (2), 59(4), 64(1) or Part 5 of the *Utilities Commission Act* in respect of a development power rate.

(4) A development power rate

(a) is lawful, enforceable and collectable, and

(b) is not a rate to which section 59(1) of the *Utilities Commission Act* applies.

(5) The government, the authority and any public utility are not subject to Part 3 or Part 5 of the *Utilities Commission Act* in relation to any matter arising out of the supply of electricity with respect to which an order has been made under section 3 or 6 of this Act, unless the Lieutenant Governor in Council orders that a provision of Part 3 or Part 5 of the *Utilities Commission Act* that the Lieutenant Governor in Council specifies applies with respect to that matter.

(6) If there is any conflict or inconsistency between

(a) an order made under section 6(1) and (2) for the purposes of section 6(3), and

(b) either

(i) section 363 *(imposition of fees and charges)* of the *Local Government Act*, or any bylaw made under that section, or

(ii) section 194 *(municipal fees)* or 200 *(parcel tax bylaw)* of the *Community Charter*, or any bylaw made under those sections,

the order made under section 6 (1) and (2) prevails.

(7) The wholesale transmission rates otherwise payable by those customers of the authority that transmit power under published wholesale transmission rates must not be altered to compensate for

(a) an order made under section 3 or 6, or

(b) any reduction in the wholesale transmission revenue requirement resulting from that order.

Application to the administrator

8 A business wishing to be considered for an order under section 3 or 6 must apply to the administrator for that order.

PART 3 — POWER FOR JOBS ADMINISTRATOR

Administrator's mandate

9 (1) If the Lieutenant Governor in Council determines that surplus electricity may be made available under this Act, the minister may notify the administrator of

(a) the projected amount and duration of supply of that surplus electricity,

(b) any criteria, additional to the application evaluation criteria prescribed under section 15(2)(a), that the Lieutenant Governor in

Council intends to use in assessing applications for that surplus electricity, and

(c) the manner in which the assessment required under subsection (2) is to be completed.

(2) After receiving notification under subsection (1), the administrator must assess if and to which businesses the surplus electricity should be provided.

(3) In conducting an assessment under subsection (2), the administrator,

(a) if notified by the minister under subsection (1)(c) as to the manner in which the assessment is to be completed, must conduct the assessment in accordance with that manner, or

(b) in any other case, may use any method that the administrator considers advisable to effect the assessment, including, without limitation, any one or more of the following:

(i) advertising the amount of surplus electricity that may be made available by the Lieutenant Governor in Council;

(ii) preparing a request for proposals and distributing it to any businesses that the administrator considers appropriate;

(iii) using auction processes;

(iv) negotiating with businesses;

(v) conducting financial or other evaluations of solicited and unsolicited proposals.

(4) If the administrator issues a request for proposals in respect of surplus electricity, the administrator must include in the request for proposals the ad-

ditional criteria, if any, referred to in subsection (1)(b) that the Lieutenant Governor in Council intends to use in assessing proposals or other applications for that surplus electricity.

(5) After receiving a proposal or other application for the provision to a business of surplus electricity under this Act, whether or not that application is provided in response to an action of the Lieutenant Governor in Council or the administrator, the administrator must make recommendations to the minister as to whether the application should be accepted and may suggest terms that the administrator considers should be imposed on the supply of that surplus electricity.

(6) If a proposal or other application in respect of which recommendations are made under subsection (5) appears to the minister to be consistent with the criteria to be applied by the Lieutenant Governor in Council in assessing the application, the minister is to provide the application and the recommendations of the administrator to the Lieutenant Governor in Council for assessment.

(7) The minister is to notify the administrator as to the disposition of the application and the administrator must notify the applicant as to that disposition.

(8) The administrator may, when invited to do so by the Job Protection Commissioner and authorized to do so by the minister, consult with the Job Protection Commissioner in respect of any economic plan made or proposed under the *Job Protection Act* and may, if it appears appropriate to do so, recommend to the Lieutenant Governor in Council that an order be made under section 3 or 6 of this Act in order to assist in the economic plan.

Considerations administrator is to consider

10 In carrying out the mandate under section 9, the administrator is to give due consideration to economic, environmental and societal interests including, without limitation,

(a) any new employment relationships that may be established as a result of this Act,

(b) government objectives with respect to employment equity,

(c) the economic importance of a business to British Columbia or to a region or locality within British Columbia, and

(d) the purpose of this Act.

Confidentiality

11 The administrator and every other person who has custody of or access to records or information provided by a business in a proposal or other application provided to the administrator under this Act must not disclose the records or information to any person except insofar as disclosure is

(a) necessary for the purposes of this Act,

(b) required by a court proceeding relating to this Act, or

(c) for the purposes of the compilation and publication of statistical information by the government.

No testimony in civil action

12 The administrator is not, in a civil action to which the administrator is not a party, required to testify or produce evidence about records or information obtained in the discharge of duties under this Act.

Report to Lieutenant Governor in Council

13 The administrator, in each year, must make to the Lieutenant Governor in Council a report of

the activities of the administrator for the preceding calendar year.

PART 4 — GENERAL PROVISIONS

Offence

14 (1) A person who contravenes section 11 commits an offence.

(2) Section 5 of the *Offence Act* does not apply in respect of this Act or the regulations.

Power to make regulations

15 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations

(a) respecting the criteria that may be applied by the Lieutenant Governor in Council in assessing a proposal or other application for an order under section 3 or 6, including, without limitation, the tests that may be applied by the Lieutenant Governor in Council in determining if and to what extent an order may be made under those sections, and

(b) prescribing the information that must be contained in a proposal or other application under section 3 or 6.

Commencement

16 This Act comes into force by regulation of the Lieutenant Governor in Council.

PROVINCE OF BRITISH COLUMBIA
ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

Order in Council No. 494 *Approved and Ordered March 30, 2000*

/s/ [Illegible]
Administrator

Executive Council Chambers, Victoria

On the recommendation of the undersigned, the Administrator, by and with the advice and consent of the Executive Council, orders that the Special Directive No. 4 attached to this order is issued to the British Columbia Hydro and Power Authority.

/s/ [Illegible]

Minister of Energy and Mines and Minister Responsible for Northern Development

/s/ [Illegible]

Presiding Member of the Executive Council

(This part is for administrative purposes only and is not part of the Order)

Authority under which Order is made:

Act and section: - *Hydro and Power Authority Act*, s. 35

Other (specify): -

March 21, 2000 496/2000/13

SPECIAL DIRECTIVE NO. 4 TO THE BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Application

1 This Special Directive is issued by the Lieutenant Governor in Council to the British Columbia Hydro and Power Authority ("B.C. Hydro") under authority of section 35 of the *Hydro and Power Authority Act* (the "Act") as it pertains to annual payments to the provincial government of an amount specified in this Special Directive.

Return on public investment

2 For the purpose of this Directive only, the following definitions shall apply:

"Commission" means the British Columbia Utilities Commission constituted under the *Utilities Commission Act*;

"debt" means the sum of revolving borrowings, bonds, notes and debentures, net of related sinking funds, temporary investments, term debentures receivable and repurchased debt, at the end of the financial year;

"distributable surplus" means consolidated net income from all sources including electricity trade income as computed by B.C. Hydro according to generally accepted accounting principles and confirmed by B.C. Hydro's external auditors,

(a) after any rate stabilization account transfers pursuant to paragraphs 3 and 4 and before any deduction for any amounts paid or payable in accordance with a directive issued under section 35 of the *Hydro Power and Authority Act*, and

(b) less interest during construction adjusted for depreciation to prevent double counting;

"equity" means the sum of retained earnings and deferred credits, at the end of the financial year;

"deferred credits" means the sum of the rate stabilization account, deferred revenue, contributions arising from the Columbia River Treaty and contributions in aid of construction at the end of the financial year.

3 If the consolidated net income, before any rate stabilization account transfers, is less than the amount needed by B.C. Hydro to achieve an annual rate of return on equity pursuant to Special Directive No. 8 to the Commission, then the consolidated net income shall be increased accordingly by an appropriate transfer from the rate stabilization account, provided,

(a) there is a positive balance in the rate stabilization account before the transfer,

(b) there is a zero or positive balance in the rate stabilization account after the transfer, and

(c) the debt/equity ratio of B.C. Hydro after the transfer is not greater than 80:20.

4 If the consolidated net income, before any rate stabilization account transfers, is greater than the amount needed by B.C. Hydro to achieve an annual rate of return on equity pursuant to Special Directive No. 8 to the Commission, then the consolidated net income shall be decreased accordingly by an appropriate transfer to the rate stabilization account.

5 On or before June 30 of each year, the B.C. Hydro Board of Directors shall confirm a payment to the

provincial government (the "payment") for the previous financial year as determined below.

6 The payment shall equal 85 percent of the distributable surplus for the financial year provided the debt/equity ratio of B.C. Hydro after deducting the payment is not greater than 80:20. If the payment would result in the debt/equity ratio exceeding 80:20, then the payment shall be reduced to the extent necessary to maintain the debt/equity ratio at 80:20 after deducting the payment.

7 The payment determined by paragraph 6 shall be paid into the provincial government's consolidated revenue fund by no later than June 30 each year.

8 This directive is effective for the financial year ending March 31, 2000, and all subsequent financial years.

Revocation of Special Directive No. 2

9 This Special Directive revokes and replaces Special Directive No. 2 dated November 13, 1992.

B.C. Reg. 71/98, deposited March 16, 1998, pursuant to the **UTILITIES COMMISSION ACT** [Section 3.1]. Order in Council 1684/92, approved and ordered November 13, 1992.

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that

1. The Special Direction No. 8 attached to this order is issued to the British Columbia Utilities Commission, and

2. Special Direction No. 3 of October 5, 1989 to the British Columbia Utilities Commission is revoked. — A. EDWARDS, *Minister of Energy, Mines and Petroleum Resources*; M. HARCOURT, *Presiding Member of the Executive Council.*

SPECIAL DIRECTION No. 8

TO THE BRITISH COLUMBIA UTILITIES COMMISSION

Application

1. This Special Direction is issued by the Lieutenant Governor in Council to the British Columbia Utilities Commission (the "Commission") under authority of Section 3.1 of the *Utilities Commission Act* (the "Act") with respect to the exercise of the Commission's powers and functions as they apply to the British Columbia Hydro and Power Authority ("B.C. Hydro").

Definitions

2. For the purpose of this Special Direction only, the following definitions shall apply:

(a) **"debt"** means the sum of revolving borrowings, bonds, notes and debentures, net of related sinking funds, temporary investments, term debentures receivable and repurchased debt, at the end of the financial year.

(b) **"deferred credits"** means the sum of the Rate Stabilization Account, deferred revenue, contributions arising from the Columbia River Treaty and contributions in aid of construction.

(c) **"equity"** means the sum of retained earnings and deferred credits, at the end of the financial year.

(d) **"total invested capital"** means debt plus equity, at the end of the financial year.

Conservation and Efficient Electricity Use

3. In designing B.C. Hydro electricity rates, the Commission shall ensure that those rates contribute to conservation and efficient electricity use by reflecting the total cost of new sources of electricity supply, and those costs shall be evaluated using a cost of capital consistent with that earned on a pre-income tax basis by the most comparable investor-owned energy utility regulated under the Act.

Basis for Establishing Revenue Requirements

4. In order to determine an appropriate basis for establishing B.C. Hydro revenue requirements and a fair and reasonable return for B.C. Hydro comparable to, and competitive with, returns earned on total invested capital by investor-owned utilities, the Commission must allow B.C. Hydro to generate sufficient revenues in each financial year to:

(a) sustain an operating and capital regime that continues to provide a quality and reliable electricity service;

(b) meet other expenses reasonably incurred in accordance with government policy directives;

(c) meet all debt service, tax, and other financial obligations; and,

(d) achieve an annual rate of return on equity equal to that allowed on a pre-income tax basis by the most comparable investor-owned energy utility regulated under the Act.

5. The return on equity in paragraph 4(d) must be calculated using consolidated operating income from all sources before any Rate Stabilization Account transfers, where projections of consolidated operating income include an amount of electricity trade income consistent with the Commission's forecast of annual net export revenue under average water conditions, as contained in the Commission's report to the Lieutenant Governor in Council dated June 30, 1992, as amended, on B.C. Hydro's Energy Removal Certificate application.

Smooth, Stable and Predictable Rate Increases

6.1 Notwithstanding paragraph 4(d), in setting B.C. Hydro electricity rates, the Commission shall ensure that rates are smooth, stable and predictable.

6.2 Smooth, stable and predictable rates for the purpose of setting B.C. Hydro electricity rates means that, with the exception of pass through items pursuant to Section 67(4) of the Act, general electricity rate increases shall not exceed 1 percentage point above the rate of inflation for the remainder of the 1992/93 financial year and shall not exceed 2 percentage points above the projected rate of inflation on a year over year basis thereafter.

6.3 For the purpose of implementing rate design or of closing rates, individual electricity rate increases may exceed the limits set out in paragraph 6.2.

6.4 The rate of inflation in paragraph 6.2 means the change in the average level of the British Columbia consumer price index during the most recent three month period for which published statistics are available prior to B.C. Hydro's rate application fil-

ing, compared to the average level of the British Columbia consumer price index during the same three month period a year earlier, and published statistics shall mean those published by Statistics Canada.

6.5 The projected rate of inflation in paragraph 6.2 means the provincial Ministry of Finance and Corporate Relations' latest available forecast published prior to B.C. Hydro's rate application filing of future year over year changes in the average level of the British Columbia consumer price index.

Fair, Just and Reasonable Rates

7.1 In setting B.C. Hydro electricity rates the Commission shall ensure that rates are fair, just and reasonable.

7.2 Notwithstanding Part 3 of the Act or any previous decision of the Commission, fair, just and reasonable rates for the purpose of setting B.C. Hydro electricity rates means rates set in accordance with this Special Direction.

Return on Public Investment

8. Electricity rates set by the Commission in accordance with this Special Direction may generate annual distributable surpluses for B.C. Hydro. These surpluses shall only be calculated and allocated in a manner specified by the Lieutenant Governor in Council pursuant to Section 54.1(a) of the *Hydro and Power Authority Act.*

This Special Direction revokes and replaces Special Direction No. 3 of October 5, 1989.

B.C. Reg. 72/98, deposited March 16, 1998, pursuant to the **UTILITIES COMMISSION ACT** [Section 3(2)]. Order in Council 1279/97, approved and ordered November 25, 1997.

On the recommendation of the undersigned, the Administrator, by and with the advice and consent of the Executive Council, orders that Special Direction No. 8 of November 13, 1992, issued to the British Columbia Utilities Commission, is amended as set out in the attached Schedule. — D. MILLER, *Minister of Employment and Investment*; G. CLARK, *Presiding Member of the Executive Council.*

SCHEDULE

1. Section 1 of Special Direction No. 8 of November 13, 1992, issued to the British Columbia Utilities Commission, is amended by striking out "as they apply to" and substituting "in regulating and fixing rates for".

2. Section 2 is amended by adding the following paragraph:

   (c.1) "government policy directive" means a directive in writing to B.C. Hydro from the minister charged with the administration of the *Hydro and Power Authority Act*;

3. Section 4 is amended

   (a) by striking out "In order to determine an appropriate basis for establishing B.C. Hydro revenue requirements and a fair and reasonable return for B.C. Hydro comparable to, and competitive with, returns earned on total invested capital by investor-owned utilities, the" and substituting "The", and

   (b) by repealing paragraph (b) and substituting the following:

(b) meet other expenses reasonably incurred in accordance with government policy directives including, but not limited to,

(i) directives for the construction or operation of a plant or system, or an extension to either of them, by B.C. Hydro, and

(ii) directives that B.C. Hydro enter into contracts.

4. The following section is added:

Government policy directives

9. The Commission must determine any matter respecting B.C Hydro in a manner that permits B.C. Hydro to undertake any construction, enter into any contract or modify its rates in a manner that complies with any government policy directive.

B.C. Reg. 73/98, deposited March 16, 1998, pursuant to the **UTILITIES COMMISSION ACT** [Section 3]. Order in Council 316/98, approved and ordered March 13, 1998.

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that Special Direction No. 8 of November 13, 1992 to the British Columbia Utilities Commission is amended as set out in Schedule to this order. — M. FARNWORTH, *Minister of Employment and Investment and Minister Responsible for Housing*; J.K. MACPHAIL, *Presiding Member of the Executive Council.*

SCHEDULE

1. Sections 1 and 2 of Special Direction No. 8 of November 13, 1992, issued to the British Columbia Utilities Commission, are repealed and the following substituted:

Definitions

1. In this Special Direction:

"Act" means the *Utilities Commission Act*;

"B.C. Hydro" means the British Columbia Hydro and Power Authority;

"Commission" means the British Columbia Utilities Commission;

"debt" means the sum of revolving borrowings, bonds, notes and debentures, net of related sinking funds, temporary investments, term debentures receivable and repurchased debt, at the end of the financial year;

"deferred credits" means the sum of the Rate Stabilization Account, deferred revenue, contributions arising from the Columbia River Treaty and contributions in aid of construction;

"equity" means the sum of retained earnings and deferred credits, at the end of the financial year;

"government policy directive" means a directive in writing to B.C. Hydro from the minister charged with the administration of the *Hydro and Power Authority Act*;

"total invested capital" means debt plus equity, at the end of the financial year.

Application

2. This Special Direction is issued to the Commission under section 3 of the *Utilities Commission Act*.

2. Section 4 is amended by striking out "The commission must allow B.C. Hydro to generate" and substituting "In determining whether the rates of B.C. Hydro are sufficient to yield a fair and reasonable compensation for the services provided by it, or a fair and reasonable return on the appraised value of its property, the Commission must ensure the rates permit B.C Hydro to collect".

3. Section 6.2 is amended by striking out "Section 67(4)" and substituting "section 61(4)".

4. Section 7.2 is repealed.

5. Section 8 is amended by striking out "Section 54.1(a)" and substituting "section 35".

6. Section 9 is repealed.

B.C. Reg. 119/2000, deposited March 31, 2000, pursuant to the **UTILITIES COMMISSION ACT** [Section 3]. Order in Council 493/2000, approved and ordered March 30, 2000.

On the recommendation of the undersigned, the Administrator, by and with the advice and consent of the Executive Council, orders that B.C. Reg. 71/98, Special Direction No. 8 to the British Columbia Utilities Commission, is amended as set out in the Schedule to this order. — G. WILSON, *Minster of Employment and Investment*; U. DOSANJH, *Presiding Member of the Executive Council.*

SCHEDULE

1. The definition of "deferred credits" in section 1 of B.C. Reg. 71/98, Special Direction No. 8 to the British Columbia Utilities Commission, is amended by striking out "construction;" and substituting "construction at the end of the financial year,".

2. Section 5 is repealed and the following substituted:

Calculation of return on equity

5 (1) The return on equity in paragraph (4)(d) must be calculated using consolidated net income from all sources,

(a) where projections of consolidated net income include an amount of electricity trade income consistent with the Commission's forecast of annual net export revenue under average water conditions, as contained in the Commission's report to the Lieutenant Governor in Council dated June 30, 1992, as amended on B.C. Hydro's Energy Removal Certificate application, and

(b) where projected consolidated net income, before any rate stabilization account

transfers, is less than the amount needed by B.C. Hydro to achieve an annual rate of return on equity pursuant to paragraph 4(d), an allowance for an appropriate transfer from the rate stabilization account provided

(i) there is projected to be a positive balance in the rate stabilization account before the transfer,

(ii) there is projected to be a zero or positive balance in the rate stabilization account after the transfer, and

(iii) the debt/equity ration of B.C. Hydro after the transfer is not greater than 80:20.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

May 23, 2005

Mr. David C. Frederick
Kellogg Huber Hansen
Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036

Re: Powerex Corp.
v. Reliant Energy Services, Inc., et al.
Application No. 04A985

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on May 23, 2005 extended the time to and including July 1, 2005.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by
/s/ RUTH JONES
Ruth Jones
Case Analyst

[attached notification list omitted]

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

June 22, 2005

Mr. David C. Frederick
Kellogg Huber Hansen
Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036

Re: Powerex Corp.
v. Reliant Energy Services, Inc., et al.
Application No. 04A985

Dear Mr. Frederick:

The application for a further extension of time in the above-entitled case has been presented to Justice O'Connor, who on June 22, 2005 extended the time to and including July 15, 2005.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by
/s/ RUTH JONES
Ruth Jones
Case Analyst

[attached notification list omitted]

6

Supreme Court, U.S.
FILED
DEC - 6 2005
OFFICE OF THE CLERK

No. 05-85

IN THE

Supreme Court of the United States

POWEREX CORP.,
Petitioner,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PLAINTIFFS AND RESPONDENTS IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED

1. Whether the Petition is moot, in light of the fact that the remand has been effectuated and cannot be undone.

2. Whether the Petition is moot, in light of the fact that Plaintiffs' claims have all been either settled or dismissed, and the cross-complaints for indemnity have been dismissed against all cross-defendants except Powerex, solely because Powerex refuses to stipulate to such dismissal.

3. Whether the Court of Appeals applied a new and different test to determine whether Powerex is an "organ of a foreign state" under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1603(b)(2), or merely applied its existing jurisprudence and reached a result dissatisfactory to Powerex.

4. Whether the district court's finding that Powerex is not an "organ of a foreign state" under the FSIA was reviewable by the Court of Appeals or is reviewable by this Court.

5. Whether Powerex is an "agency or instrumentality of a foreign state" under the FSIA.

PARTIES TO THE PROCEEDINGS

Barry H. Himmelstein was not a plaintiff/appellee. (Barry R. Himmelstein was and is *counsel* for plaintiffs-appellees.)

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IN THE

Supreme Court of the United States

POWEREX CORP.,
Petitioner,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF PLAINTIFFS AND RESPONDENTS IN OPPOSITION TO THE PETITION

Plaintiffs and Respondents[1] (collectively, "Plaintiffs") respectfully submit this brief in opposition to the Petition for a Writ of Certiorari (the "Petition") filed by

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[1] Plaintiffs and Respondents are: People of the State of California *ex rel.* Dennis J. Herrera and John A. Russo; City and County of San Francisco; City of Oakland; County of Santa Clara; Valley Center Municipal Water District; Padre Dam Municipal Water District; Ramona Municipal Water District; Helix Water District; Vista Irrigation District; Yuima Municipal Water District; Fallbrook Public Utility District; Borrego Water District; Metropolitan Transit Development Board; San Diego Trolley, Inc.; San Diego Transit Corporation; Sweetwater Authority; Pamela R. Gordon; Ruth Hendricks; Oscar's Photo Lab; Mary L. Davis; Cruz Bustamante; and Barbara Mathews.

Powerex Corp. ("Powerex").

STATEMENT OF THE CASE

New and additional facts not presented in Powerex's Statement of the Case render the Petition moot. The Court of Appeals issued the mandate on March 11, 2005. The Court of Appeals denied Powerex's motion to recall the mandate on April 6, 2005. The remand was effectuated, and jurisdiction was returned to the Superior Court of the State of California, County of San Diego (the "Superior Court"), on or about May 5, 2005. *See* 28 U.S.C. § 1447(c) ("A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.").

As set forth in the Petition, in the underlying actions, Plaintiffs sued a number of power generators and marketers for violation of California's antitrust law (the Cartwright Act), and California's Unfair Competition Law. Two of these defendants, Reliant Energy Services, Inc. ("Reliant") and Duke Energy Trading and Marketing, LLC ("Duke"), together with their corporate affiliates, subsequently cross-complained against Powerex and over a dozen other entities, seeking indemnity. Several of these cross-defendants, including Powerex, removed the litigation to district court. Plaintiffs moved for remand based on the lack of federal subject matter jurisdiction, which motion was granted by the district court.

In September 2004, while the appeal from the district court's remand order was pending, Plaintiffs entered into a proposed $206.5 million class action settlement with Duke. The settlement was granted preliminary approval by the Superior Court in July 2005. There have been no objections to the proposed settlement, and a final approval hearing will be held by the Superior Court on December 9, 2005.

In August 2005, after the remand was effectuated, Plaintiffs entered into a memorandum of understanding with Reliant setting forth the terms of a proposed class action settlement. The $453 million settlement was formalized on October 12, 2005, and a preliminary approval hearing will be held by the Superior Court on January 6, 2006.

Meanwhile, on October 4, 2005, the Superior Court dismissed Plaintiffs' consolidated complaint with prejudice, holding that the claims asserted by Plaintiffs were preempted by the Federal Power Act and the filed-rate doctrine. At the joint request of Plaintiffs, Duke, and Reliant, the Superior Court's order did not dismiss Plaintiffs' claims against these entities, so as not to interfere with the settlement approval process.

With Plaintiffs' claims against *all* defendants either settled or dismissed, as a practical matter, the Duke and Reliant cross-complaints became moot. Accordingly, Duke, Reliant, and the numerous cross-defendants stipulated to the dismissal with prejudice of the cross-complaints, subject to reinstatement only if the respective settlement is disapproved or overturned on appeal. The only cross-defendant that refused to join in these stipulations was Powerex, reportedly because it did not want to formally moot this Petition, even though it has become moot in fact. Accordingly, the only reason any claims remain pending against Powerex is because Powerex has declined to stipulate to their dismissal.

REASONS FOR DENYING THE PETITION

I. THE PETITION IS MOOT ON MULTIPLE GROUNDS

A. The Petition Is Moot Because the Remand Cannot Be Undone

The district court's finding that Powerex is not an

"organ of a foreign state" under the FSIA was made in ruling on Plaintiffs' motion to remand for lack of federal subject matter jurisdiction. The issue was not presented by any other motion, or ruled on for any other purpose. Accordingly, the Court of Appeals was (and this Court is) without jurisdiction to review this finding. *See* 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise"); *Linton v. Airbus Industrie*, 30 F.3d 592 (5th Cir. 1994) (where defendant removed action under FSIA, and district court determined that removing parties did not qualify as instrumentalities of foreign state and remanded on that basis, Court of Appeals lacked jurisdiction to review district court's ruling on their status under FSIA).[2]

Even assuming, *arguendo*, that this Court had jurisdiction to review this finding, and that the finding was reversed, it would be without consequence, as the case has already been remanded to the Superior Court, and the remand, once effectuated, cannot be undone, as this Court expressly held in *City of Waco v. United States Fid. & Guar. Co.*, 293 U.S. 140 (1934).

In *Waco*, after a cross-defendant removed the case on diversity grounds, the district court granted a motion to dismiss the cross-complaint, and, "since upon that dismissal, there was no diversity of citizenship of the remaining parties, the court held that it lacked jurisdiction, and remanded the cause to the state court." 293 U.S. at 142. The defendant and cross-plaintiff "appealed, not from the order of remand, but from that dismissing its action." *Id.* at 142. The Court held that that "no appeal lies from the order of remand," but that the dismissal was appealable because it preceded the

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[2] Should the Court grant the Petition, Plaintiffs will present more detailed argument on the issue of appellate jurisdiction, which was decided incorrectly by the Court of Appeals.

remand "in logic and in fact . . . and was made by the District Court while it had control of the cause." *Id.* at 143.[3]

The Court explained that:

> *A reversal cannot affect the order of remand*, but it will at least, if the dismissal of petitioner's complaint was erroneous, remit the entire controversy, with the [dismissed cross-defendant] still a party, to the state court for such further proceedings as may be in accordance with law.

Id. at 143 (emphasis added). *See also Allen v. Ferguson*, 791 F.2d 611, 616 (7th Cir.1986) (reversing district court's dismissal of defendant which destroyed diversity after parties were realigned, but stating that resulting "remand must remain undisturbed . . . . Because the dismissal is now a nullity, Ferguson remains a defendant in the action remanded to the Illinois state court.").

As Petitioner notes:

> Powerex conceded that it did not enjoy immunity from suit under the FSIA (because its electricity sales in the United States constitute a "commercial activity" within the enumerated exceptions to sovereign immunity under the FSIA, *see* 28 U.S.C. § 1605(a)(2)). But Powerex maintained that, as a foreign sovereign, the FSIA's jurisdictional and procedural safeguards governed, which meant that the case against it could proceed only in a bench trial in federal court.

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[3] Here, by contrast, Powerex was *not* dismissed from the action, rendering the district court's finding unreviewable. *See Linton*, 30 F.3d at 596-98 (discussing *Waco*).

(Pet. at 9.)

Accordingly, if the finding that Powerex is not an "organ of a foreign state" under the FSIA is reversed, it will have no effect whatsover. It will not result in the dismissal of Powerex from the case, nor will it provide Powerex with "a bench trial in federal court," as the remand itself cannot be undone. Accordingly, the Petition is moot.

B. The Dismissal of Plaintiffs' Complaint and the Cross-Complaints Render the Petition Moot

As noted above, Plaintiffs' consolidated complaint, and the Duke and Reliant cross-complaints for indemnity, have all been dismissed, except that the cross-complaints have not been dismissed against Powerex solely because it refuses to stipulate to the dismissal. Powerex refuses to consent because it does not want to technically moot the Petition, which has already become moot in fact. If the Petition is denied, it seems highly likely that Powerex will join in the stipulation, and the cross-complaints against it will likewise be dismissed. Plaintiffs respectfully suggest that the Court has more important things to do with its limited time than to rule on matters that are moot or would be, but for Petitioner's refusal to stipulate to dismissal of the claims asserted against it.

II. THE NINTH CIRCUIT DID NOT ANNOUNCE OR APPLY A NEW OR DIFFERENT "TEST" FOR ORGAN STATUS UNDER THE FSIA

Straining to find some legitimate ground for review by this Court, Powerex repeatedly protests that the Ninth Circuit has created a new "test," "standard," or "approach" to determining "organ" status under the FSIA. Nowhere in its opinion – a scant seven paragraphs of which are devoted to the finding challenged by Powerex – does the Ninth Circuit

announce or exemplify any new rule of law or approach to the question; the Court of Appeals merely cited to and applied ts prior precedents – which Powerex itself argues state the *correct* rule of law -- to a new set of facts, arriving at a conclusion with which Powerex disagrees. *See* Pet. App. 14a-16a (citing and applying *EIE Guam Corp. v. Long Term Credit Bank of Japan*, 322 F.3d 635, 640-41 (9th Cir. 2003) and *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001)). This is not a valid basis for discretionary review by this Court. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Indeed, it is not until page 21 of the Petition that Powerex reveals the supposedly new "test" it finds wanting: "First, the Ninth Circuit no longer considers the circumstances surrounding the creation of a government entity. . . . Second, the Ninth Circuit gives no weight to the employment policies and responsibilities of the entity." (Pet. at 21.) These statements are belied by the Ninth Circuit's opinion itself, which expressly states that it is "applying *Patrickson*" (Pet. App. 15a), citing the following portion of that opinion:

> In defining whether an entity is an organ, courts consider whether the entity engages in a public activity on behalf of the foreign government. In making this determination, courts examine *the circumstances surrounding the entity's creation*, the purpose of its activities, its independence from the government, the level of government financial support, *its employment policies*, and its obligations and privileges under state law. The entity may be an organ even if it has some autonomy from the foreign government.

Patrickson, 251 F.3d at 807 (citations omitted, emphasis added).[4] As the foregoing quotation makes plain, the Ninth Circuit has not adopted a new or different test for "organ" status under the FSIA; it merely found that the district court did not err in applying *Patrickson*, and chose to highlight those factors that supported the district court's conclusion. *See* Pet. App. at 15a ("As the district court correctly noted, the facts of this case closely mirror the facts of *Patrickson* and compel our conclusion that PowereEx is not an organ of a foreign government.").

III. THE NINTH CIRCUIT'S "OWNERSHIP" HOLDING IS FULLY CONSISTENT WITH *DOLE FOOD*

Under the FSIA, a foreign corporation, such as Powerex, can qualify as an "agency or instrumentality of a foreign state" with removal power if "a majority of [its] shares . . . [are] owned by a foreign state or a political subdivision thereof . . . ." 28 U.S.C. § 1603(b)(2). In *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), the Court expressly held that "only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement," and that "[a] corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation's shares." *Id.* at 474, 477. It is undisputed that Powerex's shares are directly owned by BC Hydro, not by the Province.

In an attempt to end-run *Dole Food*, Powerex argues that the Province is the "beneficial owner" of its shares, because the Hydro and Power Authority Act provides that BC Hydro is an agent of the Province. As the Court of Appeals held, this argument fails, because it ignores the fact

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[4] The Court of Appeals cited this test with approval not once, but twice, as it is also quoted verbatim at page 640 of *EIE Guam*. *See* Pet. App. at 14a-15a.

that BC Hydro remains a separate legal entity, and while it may be an agent of the Province, it is not the Province itself. *See* Pet. App. 16a.

Powerex proposes that the Court engage in exactly the sort of "real party in interest" or "control" analysis expressly rejected by *Dole Food*. *See id.* at 474-76. Whether or not Powerex qualifies as an "agency or instrumentality of a foreign state" under the "ownership" provisions of the FSIA depends entirely on a single "corporate formality" -- whether or not the Province formally and directly holds "legal title" to its shares. *Id.* at 475. As the Court explained:

> Section 1603(b)(2) speaks of ownership. . . . In issues of corporate law structure often matters. It is evident from the Act's text that Congress was aware of settled principles of corporate law and legislated within that context. The language of § 1603(b)(2) refers to ownership of "shares," showing that *Congress intended statutory coverage to turn on formal corporate ownership.*

Id. at 474 (emphasis added). Because Powerex's shares are formally owned by BC Hydro, not the Province, the Court of Appeals correctly held that Powerex is not an "agency or instrumentality of a foreign state" under the "ownership" provisions of the FSIA.

CONCLUSION

The Petition is moot on multiple grounds, and the Court of Appeal did no more than apply the correct rule of law to determine Powerex's status under the FSIA. Accordingly, the Petition should be denied.

RESPECTFULLY SUBMITTED,

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to review the district court's order, notwithstanding 28 U.S.C. § 1447(d).

2. Whether a corporate entity is an "organ of a foreign state" under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(b)(2), when the entity's principal function is to seek out profits through trading energy resources, its operations mirror those of a private market participant and are not actively supervised by the government, and its employees, who are not civil servants, are paid generous bonuses.

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COUNTER-STATEMENT OF THE CASE

This matter does not have its origins in decades-old treaties concerning the Columbia River Basin. Rather, it begins with the energy crisis that rocked California in 2000–2001, a state court consumer class action that followed, and the efforts of certain domestic defendants to secure a federal forum by cross-claiming against foreign and federal agency parties, including Petitioner Powerex Corp. ("Powerex"), who then removed the case to federal court.

The Underlying Litigation, and the Cross-Claims Against Powerex and Others[1]

In 1996, California enacted legislation that created a sea change in the state's energy regulatory scheme. The new law shifted the state's electricity industry to a market-based system subject to few of the regulatory restraints that previously had controlled the industry. In the new regime, wholesale energy supply and prices were to be determined by competitive market forces. But that is not what happened. Instead of enhanced competition, electricity generation assets came to be concentrated primarily in five companies, including Reliant Energy Services, Inc. ("Reliant") and Duke Energy Trading and Marketing, LLC ("Duke"). The new system proved to be highly susceptible to manipulation. Freed of the constraints imposed by regulators, the generators and traders sold less electricity at inflated prices. This led to the energy crisis of 2000-2001, during which electricity costs more than quadrupled.

Beginning in November 2000, ratepayers filed several class actions against more than twenty electricity sellers and

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[1] The initial portions of the Counter-Statement of the Case regarding the underlying lawsuit are taken from allegations set forth in Plaintiffs' Master Complaint in *In re Wholesale Electricity Cases*, JCCP Nos. 4204, 4205. *See* Ex. 1 to Excerpts of Record of Appellee Powerex Corp., filed in *Reliant Energy Services, Inc. v. Powerex Corp.*, No. 03-55131 ("Reliant Appeal") (9th Cir. July 28, 2003) ("Pwx. ER"), at 0012–19.

traders, including Duke and Reliant. Plaintiffs alleged that Defendants engaged in anticompetitive conduct in California's energy market, thereby artificially inflating the price of electricity in the state, in violation of California's antitrust and consumer protection laws. Pwx. ER 0025-32.

Defendants removed these actions to federal court, asserting, *inter alia*, that they were "completely preempted" by the Federal Power Act, 26 U.S.C. § 824. The district court rejected their arguments, and remanded the cases. *See Hendricks v. Dynegy Power Mktg., Inc.*, 160 F. Supp. 2d 1155 (S.D. Cal. 2001). After remand, and just as discovery was to begin in earnest, Duke and Reliant engineered a second removal of these actions by filing cross-complaints against, among others, Bonneville Power Administration ("BPA"), Western Area Power Administration ("WAPA"), and two Canadian entities, Powerex and its corporate parent, BC Hydro and Power Corporation ("BC Hydro"). Pwx. ER 0044–86. Duke and Reliant alleged that the cross-defendants "engaged in the same conduct about which plaintiffs complain." *See Id.* at 0049, 0056, 0083.

The federal and Canadian cross-defendants filed removal petitions. Powerex and BC Hydro removed under 28 U.S.C. § 1441(d), asserting that they are "agenc[ies] or instrumentalit[ies] of a foreign state," as defined in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(a) ("FSIA" or the "Act"). Pwx. ER 0094-95, 0098-99, 0103-104. BPA and WAPA based removal on their status as United States "agenc[ies]" or "officer[s]" under 28 U.S.C. § 1442(a)(1). Pwx. ER 0108.

Plaintiffs again sought remand. They asserted that the district court lacked subject matter jurisdiction because (1) BPA, WAPA and BC Hydro were immune from suit, and (2) Powerex was not entitled to sovereign status, and thus could not remove. Plaintiffs' Notice of Motion and Motion to Remand, filed in *Reliant Energy Servs., Inc. v. Arizona Elec. Power Corp.*, No. CV-02-0990-RHW (S.D. Cal. July 25,

2002). Reliant and Duke, as well as the new foreign and federal cross-defendants, opposed the remand motion.

Powerex's Relationship with British Columbia

In the district court, Powerex portrayed itself as an arm of the British Columbia government, apparently attempting to cloak itself with the acknowledged sovereign status of its parent, BC Hydro. It recited extensive historical background regarding the Columbia River Treaty, the creation of BC Hydro and BC Hydro's relationship to the Province. It does the same here. Pwx. Br. 3–9.

Little of this history, however, bears on what Powerex actually is and does. Powerex is a wholly-owned subsidiary of BC Hydro. It sells power for profit. Pet. App. 53a; JA 110, 201; Pwx. ER 0782–84. In form and function, it is a corporation; no enabling statute authorized its creation or prescribed its powers, rights and obligations. Its Articles of Incorporation are virtually indistinguishable from those of any privately-held company. JA 252–53; Pwx. ER 0236–60. Powerex's employees are not civil servants and do not receive civil servant salaries. JA 242, 245, 260. Indeed, they receive a portion of Powerex's profits through a "unique" bonus pool—a sum that has amounted to millions of dollars per year in recent years. JA 242, 245–46.

Powerex's daily trading activities are not subject to Provincial control, and the company has no regulatory authority itself. Pet. App. 30a; JA 260. Powerex is free to trade and market its energy resources as it sees fit, subject to the same regulatory constraints as any privately-held energy company. JA 257–58. When asked which companies he viewed as Powerex's competitors, Powerex's CEO identified several, including Duke—all but one are private companies. JA 252. Powerex asserts that it is subject to certain obligations and enjoys certain privileges as a government-related company. Yet, for all its supposed "public" attributes, it is not subject

to at least one significant legislative guarantee of public accountability—British Columbia's Freedom of Information and Protection of Privacy Act, ch. 165, R.S.B.C. 1996. *See* Appendix 1a, 4a-5a.

Although Powerex originally was intended to export British Columbia's surplus hydroelectricity, it later was selected as the assignee of the Province's rights and obligations under the Columbia River Treaty. JA 112. Other private companies submitted competing proposals to market this power in the United States, but Powerex prevailed. JA 253. Yet here again, Powerex operates independently, like a private company. Its dealings with BC Hydro and the Province are at arm's length. JA 141. In fact, the Province expressly disavowed any agency relationship between it and Powerex in the assignment agreement. JA 151.

Over the years, Powerex has continued to evolve from the limited-purpose entity created in 1988 into a significant player in the western North American energy markets. It trades and markets not only hydroelectric resources, but also natural gas. JA 249. Powerex has a broad portfolio of energy sources that include many private producers, and over seventy percent of the power it markets comes from United States sources, not the British Columbia government. JA 251–52.

The District Court's Remand, the Court of Appeals' Acceptance of Jurisdiction, and Its Affirmance

After conducting a hearing on the remand motion, the district court entered a detailed order remanding the cases for lack of subject matter jurisdiction. Pet. App. 18a–44a. No other basis for remand was discussed by the court or suggested in its order. Indeed, under the sole principal heading "Subject Matter Jurisdiction over the Removed Actions," the court began by noting that "plaintiffs argue that the Court lacks jurisdiction over the removed actions and, as

such, they must be remanded." *Id.* at 20a. The court also expressly recognized that Plaintiffs' remand motion "hinges . . . on the Court's jurisdictional authority to hear the removed claims." *Id.* at 20a.

Throughout its order, the district court focused on the parties' jurisdictional arguments. The court concluded that BPA and WAPA had not waived their sovereign status. *Id.* at 39a–40a. Furthermore, the cross-claims asserted against these entities fell under the exclusive jurisdiction of the federal courts. *See* 28 U.S.C. § 1346(b). Accordingly, "under the derivative jurisdiction doctrine, [the court] does not have jurisdiction over the cross-claims filed against the United States because the state court lacked jurisdiction to hear them in the first place." Pet. App. 41a–44a.

The district court observed that BC Hydro qualified as a foreign state under the FSIA, and that the "commercial activity" exception to sovereign immunity was not met. *Id.* at 21a–24a, 31a–33a. Additionally, the court concluded that BC Hydro could not be held liable through the activities of Powerex in the United States because Powerex operates independently, rather than on BC Hydro's behalf. Thus, Powerex was held not to be BC Hydro's agent under 28 U.S.C. § 1605(a)(2). Pet. App. 24a–31a. Consequently, BC Hydro was immune from suit and there was no federal subject matter jurisdiction created by the BC Hydro removal. *Id.* at 33a.

Finally, the district court held that Powerex is not an "agency or instrumentality of a foreign state," within the meaning of 28 U.S.C. § 1603(b)(2). The court first acknowledged the factors commonly analyzed by lower courts to determine whether an entity is an "organ" of a foreign state. Pet. App. 34a. It concluded that Powerex lacks certain key characteristics of an "organ," including that it has no regulatory authority, is not immune from suit and is not subject to active governmental oversight. *Id.* at 35a. Its

board of directors is not appointed directly by the Province. *Id.* at 35a, n.9. Its employees are not civil servants and are paid bonuses not otherwise available to government employees. *Id.* at 35a & n.9. At bottom, the district court concluded, "'"Powerex constitutes [an] 'independent commercial enterprise, heavily regulated, but acting to maximize profits rather than pursue public objectives.'" *Id.* at 36a (citations omitted).

Having concluded that it lacked subject matter jurisdiction over all the removed cross-claims, the court remanded the action to state court. *Id.* at 44a. BC Hydro and the federal agencies sought clarification that the court had, in fact, intended to dismiss the cross-claims against them, and Duke, Reliant and Powerex moved to stay the remand order pending appeal. The district court rejected both motions. It observed that a stay was not called for because remand orders based on 28 U.S.C. § 1447(c) normally are not appealable. JA 282. It pointed out that a "plain and common sense review of the Court's remand order shows that the Court only stated a § 1447(c) basis for remand"—namely, lack of subject matter jurisdiction. JA 283. Similarly, in response to the BC Hydro and federal agencies' plea for dismissal, the court held that since it "lacks subject matter jurisdiction over [the cross-claims], the appropriate procedure is to remand the claim[s] to state court, rather than dismiss the claim[s]" against the immune parties. JA 285; *see* JA 287–88.

On appeal, the Ninth Circuit initially questioned whether it had appellate jurisdiction, but preliminarily concluded that it did, and then stayed the remand order pending resolution of the appeals. Order, Reliant Appeal (9th Cir. Feb. 20, 2003). Plaintiffs moved for reconsideration regarding appellate jurisdiction, but the court of appeals denied that motion. Order, Reliant Appeal (9th Cir. Sept. 5, 2003).

Ultimately, after briefing and argument—and two years after the remand order—the court of appeals issued its

decision (1) adhering to its view that it had appellate jurisdiction, and (2) affirming the ruling that Powerex is not entitled to sovereign status. Pet. App. 1a–17a. As to jurisdiction, the court stated that, notwithstanding 28 U.S.C. § 1447(d), it had jurisdiction to review "substantive issues on the merits, apart from issues of jurisdictional or procedural defects leading to remand." Pet. App. 10a.

On the question of Powerex's status, the court of appeals acknowledged that the "organ" inquiry involves examination of a number of factors. *Id.* at 15a. The court noted that Powerex offered "some evidence that it serves a public purpose." *Id.* at 16a. It concluded, however, that this factor was outweighed by others, including Powerex's "high degree of independence" from the provincial government, and the "lack of financial support from the government." *Id.* It also observed that, as in *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), *aff'd*, 538 U.S. 468 (2003), Powerex was "not run by government appointees, was not staffed with civil servants, was not wholly owned by the government, was not immune from suit, and did not exercise any regulatory authority." Pet. App. 15a–16a. Finally, the court rejected Powerex's assertion that it is "owned" by British Columbia, noting that under *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003), only an entity whose shares are owned directly by the foreign state qualify as an "organ" under the FSIA.

The court of appeals also affirmed the district court's immunity rulings regarding BC Hydro, BPA and WAPA. However, it determined that the cross-claims against the federal agencies should have been dismissed, rather than remanded. Pet. App. 16a–17a. Those rulings are now final.

Powerex then petitioned for certiorari on both the "organ" and the "ownership" prongs of its claim for "foreign state" status. The Court granted certiorari as to the former only, and

also as to the court of appeals' jurisdiction to review the remand order.[2] JA 290.

SUMMARY OF ARGUMENT

The district court remanded this case to state court, pursuant to 28 U.S.C. § 1447(c), because it lacked subject matter jurisdiction. Consequently, there was no appellate jurisdiction. The bar of section 1447(d) applies to all appeals of remand orders, except in very limited situations, none of which is present here.

The bases for jurisdiction cited by the Ninth Circuit are contrary to the section 1447(d), jurisprudence, including the Court's opinion in *Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145 (2006). *Kircher* makes clear that whether the district court makes "substantive" or other decisions in the course of concluding that it has no jurisdiction, no appeal lies from such a decision.

The additional arguments offered by Powerex and amici for appellate jurisdiction seek to recast the remand order as based on something other than section 1447(c), and thus outside the bar of section 1447(d). Again, *Kircher* teaches that when it is clear the district court intended to remand and believed that it was remanding under section 1447(c), neither second-guessing of the grounds for remand nor legal attacks on the correctness of the jurisdictional remand can create appellate jurisdiction where Congress has provided none.

Finally, this Court should reject Powerex's suggestion that it create an exception to section 1447(d) for all FSIA cases. Congress has provided statutory exceptions to section 1447(d), and that is not one of them.

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[2] The underlying litigation ultimately proceeded in state court after the Ninth Circuit's affirmance of the remand. Various Defendants settled, including Duke and Reliant, and the remaining Defendants obtained a dismissal on demurrer. Not all of those dispositions are final at this time.

If the Court finds appellate jurisdiction, it should affirm the Ninth Circuit's decision that Powerex is not an "organ of a foreign state" under the FSIA. The lower courts consistently have held that "organ" status requires that the entity in question demonstrate, at a minimum, that (1) it principally performs a government function, and (2) does so at the direction of, and under the active supervision of, the foreign state. *See, e.g., USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 206–07, 209 (3d Cir. 2003); *Patrickson*, 251 F.3d at 807–08; *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846–47 (5th Cir. 2000). Powerex cannot meet this test.

The district court and court of appeals carefully considered all the evidence submitted by the parties. Both courts concluded that, on balance, any "public" attributes Powerex may have are far outweighed by its essentially private purpose and function, and its independence from active governmental oversight. The factual findings of these courts were amply supported by the evidence, and the courts properly applied the law to those facts. This Court should not revisit those fact-specific rulings. *See Graver Tank & Mfg. Co. v. Linde Air Prods., Co.*, 336 U.S. 271, 275 (1949).

ARGUMENT

I. Title 28 of United States Code Section 1447(d) Barred the Court of Appeals from Reviewing the Remand

A. The Jurisdictional Bar of Section 1447(d) Is Broad, and Judicial Exceptions Are Meant to Be Narrow

For more than a century, "Congress has placed broad restrictions on the power of the federal appellate courts to review district court orders remanding removed cases to state court." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995). The most recent codification of the statutory bar to appellate review of remand orders, 28 U.S.C. § 1447(d),

provides in broad and unambiguous terms that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." The plain terms of that statute should have barred the court of appeals from reviewing the remand order here.

This Court has repeatedly recognized the reasons for a "'strong congressional policy against review of remand orders.'" *Things Remembered*, 516 U.S. at 136 (Ginsburg, J., concurring) (quoting *Sykes v. Texas Air Corp.*, 834 F.2d 488, 490 (5th Cir. 1987)). As this Court explained in *Kircher*: "The policy of Congress opposes 'interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.'" 126 S. Ct. at 2152 (quoting *United States v. Rice*, 327 U.S. 742, 751 (1946)); *accord Osborn v. Haley*, 127 S. Ct. 881, 886 (2007). Indeed, even in the *Thermtron* decision, which for the first time recognized a non-statutory exception to section 1447(d), the Court acknowledged that goal: "There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues, Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c)." *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976) (citation omitted).[3] In his dissent, then-Associate Justice Rehnquist underscored the same goal—"to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand"—and also warned of the problems that could be created by expansion of the newly-created exception. *Id.* at 354–55, 357 (Rehnquist, J., dissenting).

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[3] *Thermtron* permitted appellate review of a remand that was based upon an overcrowded docket, finding such a remand flatly unauthorized by Congress. 423 U.S. at 351.

In *Kircher*, this Court echoed those concerns, noting that the potential for delay was real and substantial, and bemoaning "nearly three years of jurisdictional advocacy" in that case as "confirm[ing] the congressional wisdom" of section 1447(d). 126 S. Ct. at 2152. This case involves a similar delay of more than two years, from a removal in 2002, a remand that same year, and an appeal to the Ninth Circuit, resulting in an affirmance in late 2004, which is still under attack three years later. Unfortunately, the federal reporters are full of such stories.[4]

The bar of section 1447(d) is intended to sweep broadly, "apply[ing] equally to cases removed under the general removal statute, § 1441, and to those removed under other provisions." *Kircher*, 126 S. Ct. at 2153. Where section 1447(d) applies, "'review is unavailable no matter how plain the legal error in ordering the remand.'" *Id.* at 2154 (quoting *Briscoe v. Bell*, 432 U.S. 404, 413–14 n.13 (1977)). Thus, although Powerex focuses its brief on alleged misreadings of the FSIA (Pwx. Br. 20–39), or alleged errors regarding subject matter jurisdiction (*id.* at 41–47), neither point can win the day ***even if correct***. Both arguments seek to show error in the remand, but "a remand premised on an erroneous conclusion of no jurisdiction is unappealable." *Kircher*, 126 S. Ct. at 2154.

The breadth of this principle is well established. In *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977) (per curiam), the defendant removed on the basis of diversity

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[4] An amicus brief filed in *Kircher* referred to a survey of 250 recent appellate decisions analyzing the application of section 1447(d), the majority of which found an exception to the bar on appellate review. Brief of Law Professors Arthur R. Miller *et al.* as Amici Curiae Supporting Petitioners, at 11 n.5, *Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145 (2006) (No. 05-409) ("LP. Amicus Br."). We understand that Professor Miller and others intend to file an amicus brief here, so we will leave to them further elaboration of the lower courts' confusion and unwarranted expansion of the exceptions to section 1447(d), both of which are reflected in this case and in Powerex's arguments on jurisdiction.

jurisdiction, alleging that it was a Missouri corporation. *See In re Southwestern Bell Tel. Co.*, 535 F.2d 859, 860 (5th Cir. 1976) (per curiam). Based on defendant's pleadings in a previous suit, the district court held that defendant was estopped from claiming that it was not a Texas citizen, and therefore remanded the case for lack of diversity jurisdiction. On writ of mandamus, the Fifth Circuit acknowledged the "general rule" that remand orders are unreviewable, but read *Thermtron* to permit review of the district court's estoppel decision, because that issue in and of itself was not "jurisdictional." *Id.* at 860–61.

This Court summarily reversed in a brief per curiam opinion. It rejected the premise that a district court order that had "employed erroneous principles in concluding that [the court] was without jurisdiction" was appealable. *Gravitt*, 430 U.S. at 723. Instead, this Court expressly confirmed that "*Thermtron* did not question but re-emphasized the rule that § 1447(c) remands are not reviewable." *Id.* at 724. Thus, because "[t]he District Court's remand order was plainly within the bounds of § 1447(c)," it "was unreviewable by the Court of Appeals." *Id.* at 723.

B. The District Court Remanded This Case for Lack of Subject Matter Jurisdiction Pursuant to Section 1447(c)

1. *The District Court Said Numerous Times that It Was Remanding for Lack of Subject Matter Jurisdiction, Cited Section 1447(c), and Never Said Anything Different*

The district court's statements about its remand order are obviously crucial in determining whether a case was remanded pursuant to section 1447(c). "If a trial judge ***purports*** to remand a case on the ground that it was removed 'improvidently and without jurisdiction,' his order is not subject to challenge in the court of appeals." *Thermtron*, 423 U.S. at

343 (quoting prior version of § 1447(c)) (emphasis added). There are no magic words or code sections that must be invoked for section 1447(d) to apply. In *Kircher*, this Court noted that what is important is that the district court "understood that it was making a jurisdictional ruling." 126 S. Ct. at 2156. Here, it is quite clear, from both its words and the circumstances, that the district court understood and intended that it was making a jurisdictional ruling.

First, the order of remand had only one principal subject matter heading: "I. Subject Matter Jurisdiction over the Removed Actions." Pet. App. 20a. The order had only two secondary headings: "A. Jurisdiction Over the 'Foreign State' Cross Defendants" and "B. Jurisdiction Over the United States Cross Defendants." *Id.* at 20a, 38a. The order uses the term "jurisdiction" almost fifty times, and contains nothing suggesting any other basis for remand.

Further, when certain defendants moved immediately to stay the remand order, the district court declined to do so, because "the premise of the Court's order was that it did not have subject matter jurisdiction over the removed actions," explicitly referring to section 1447(c) on eleven occasions. JA 281–85. The court also quoted its own comment at oral argument that "'the issue hinges, then, on the Court's jurisdictional authority to hear the removed claims.'" *Id.* at 283; *see also id.* at 284 ("In light of the Court's ultimate conclusion that the entire case has to be remanded for lack of subject matter jurisdiction, the Court's determination that the Cross-Defendants are immune under the FSIA is a jurisdictional finding."). Finally, in a third order issued a week later that denied BPA's motion to clarify, the district court again confirmed that it had "determined that it lacks subject matter jurisdiction over [the] removed claim." JA 288.

Thus, the "label" the court used, *Kircher*, 126 S. Ct. at 2153, consistently and repeatedly, was lack of subject matter jurisdiction, with explicit references to section 1447(c).

Powerex bravely asserts that "there is no clear label to be found" in the trial court's order, Pwx Br. 46, apparently ignoring the words used and referring only to the lack of an explicit reference to section 1447(c) in the initial remand order. Powerex tries to dispose of the court's citation to section 1447(c) in the order denying the stay as an "after-the-fact recharacterization." *Id.* at 47 n.58. But the initial remand order used the words "subject matter jurisdiction" throughout. *Id.* at 20a–44a. And all three of the district court's orders, issued in quick succession, are entirely consistent with one another and with the court's comments about "jurisdiction" at oral argument (which preceded the alleged "recharacterization"). Where the court did refer to a statute, it was section 1447(c). As in *Kircher*, the district court surely "understood that it was making a jurisdictional ruling." 126 S. Ct. at 2156.

Powerex's implicit assertion that the district court had to cite section 1447(c) in its initial order for Congress's bar on appeals to apply is utterly without support. For example, the Second Circuit applied section 1447(d)'s jurisdictional bar in far more challenging circumstances in *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116 (2d Cir. 2003). There, "the district court never used the words 'subject matter jurisdiction,' 'federal question jurisdiction,' or even 'jurisdiction' when ordering a remand, [but] such phrases are not necessary for our analysis." *Id.* at 128–29. Rather, the court of appeals must "read[] the remand order in the most logical light possible." *Id.* at 121; *accord In re WTC Disaster Site*, 414 F.3d 352, 367–68 (2d Cir. 2005) (no appellate jurisdiction over remand order even though "the court did not, in the main body of its opinion, mention § 1447(c)"). Even stronger is the rule announced in *Heaton v. Monogram Credit Card Bank*, 231 F.3d 994, 997 (5th Cir. 2000), that only where the district court "clearly and affirmatively relies on" a code section ***other*** than section 1447(c) will appeal be permitted.

Also unavailing is Powerex's reliance on an out-of-context quotation of a preliminary phrase from the remand order, that "'the actions were properly removed in the first instance.'" Pwx. Br. 41. The full quote from the order is:

> None of the parties contend that the cross-claimants could not remove these actions under the provisions of 28 U.S.C. §§ 1441 and 1442. ***Rather plaintiffs argue that the court lacks jurisdiction over the removed actions and, as such, they must be remanded.*** The issue hinges, then, on the court's ***jurisdictional authority*** to hear the removed claims, not whether the actions were properly removed in the first instance.

Pet. App. 20a (emphasis added).

Powerex's assertion that the isolated words are an acceptance of subject matter jurisdiction is quite unfair to the district court, and flatly wrong. Surely the district court did not mean say at the outset of its order that it had subject matter jurisdiction, when that was the very issue it addressed and decided negatively in the remainder of the order. Nor was it the case that "none of the parties" challenged subject matter jurisdiction. The Plaintiffs-Respondents, the only moving party on the remand motion, surely did—as the court noted. *Id.* It is plain that the trial court was confirming that no one challenged the procedural correctness of the removal, and that the only issue before him was subject matter jurisdiction.

2. *Section 1447(d) Prohibits the Appellate Courts from Second-Guessing the Basis for a Remand*

Most of Powerex's appellate jurisdiction argument hinges on second-guessing the district court's basis for its remand order in an effort to recast it as a remand of a supplemental claim. This argument fails for multiple reasons. *See* Parts I.D.1., and I.E, below. Most fundamentally, that was not the articulated basis for the remand.

In applying section 1447(d), the court of appeals may not recast the basis for the remand and thus create appellate jurisdiction. As this Court said in *Kircher*, "right or wrong [the district court] understood that it was making a jurisdictional ruling." 126 S. Ct. at 2156; *see also Linton v. Airbus Indus.*, 30 F.3d 592, 600 (5th Cir. 1994) ("[e]fforts to dissect the reasoning of that conclusion [of no district court jurisdiction] so as to find appellate jurisdiction are little more than veiled attempts to investigate indirectly the correctness of the district court's conclusion"). Other lower courts have also reached the same conclusion. The Tenth Circuit explained that, "the district court need not be correct in its determination that it lacked subject matter jurisdiction, however, so long as it made that determination ***in good faith***." *Archuleta v. Lacuesta*, 131 F.3d 1359, 1362 (10th Cir. 1997); *see Adkins v. Illinois Cent. R.R.*, 326 F.3d 828, 834 (7th Cir. 2003) ("the only important point is that the district court did not ***think*** that [anything] saved its jurisdiction"); *accord Heaton*, 231 F.3d at 997 (no appeal absent clear and affirmative reliance by district court on non-section 1447(c) basis).

As its opinion reflects, the district court "understood" its remand order to be for lack of jurisdiction, made that decision in "good faith," and did not think that anything "saved its jurisdiction." Pet. App. 18a–44a. Indeed, the ultimate statement on the subject in *Kircher* could be repeated here verbatim: "[E]ven if it is permissible to look beyond the court's own label, the orders are unmistakably premised on the view that removal jurisdiction" was lacking. 126 S. Ct. at 2153. Some members of this Court would go further. *See id.* at 2157–59 (Scalia, J., concurring) (district court's invocation of jurisdictional ground should end the inquiry). But whichever test is employed, the result here is the same. The label is clear, the intent is clear, and there is no ambiguity.

3. *The District Court Ruled that It Had Not Obtained Subject Matter Jurisdiction Through the BPA/WAPA Removal Because of the Derivative ~~Jurisdiction~~ Doctrine and Because of Sovereign Immunity*

The district court's statements that it had no jurisdiction should end the inquiry. However, as Powerex and amici have labored mightly to challenge that court's jurisdictional analysis, we are forced to respond.

The district court held that it had no jurisdiction over BPA and WAPA because of the "derivative jurisdiction" doctrine. Pet. App. 41a–44a. As explained in *Lambert Run Coal Co. v. Baltimore & O.R. Co.*, 258 U.S. 377 (1922), that doctrine provides: "If the state court lacks jurisdiction of the subject matter or of the parties the federal court acquires none [on removal], although it might in a like suit originally brought there have had jurisdiction." *Id.* at 382.

Here, the state court did not have jurisdiction over the cross-claims against BPA and WAPA because the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1) and 2679(b)(1), provides that the federal courts have exclusive jurisdiction over suits against federal agencies. Since the superior court had no jurisdiction over these cross-claims or parties, the removal petition could not create jurisdiction in the district court. *Lambert Run Coal Co.*, 258 U.S. at 382.

The statutory scheme regarding the derivative jurisdiction doctrine has changed twice in recent years, but the changes do not affect the result here. In 1986, Congress amended 28 U.S.C. § 1441 in a manner that suggested to some courts that the derivative jurisdiction doctrine might have been abrogated, at least for section 1441 cases.[5] However, Congress

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[5] *See* Judicial Improvement Act of 1985, Pub. L. 99-336, § 3, 100 Stat. 633, 637 (1986), adding subsection (e) to 28 U.S.C. § 1441.

amended section 1441 again in 2002,[6] making clear that the doctrine remained in full force, at least as to section 1442 removals.[7] The BPA and WAPA removal was made pursuant to section 1442.[8] Pet. App. 41a–44a.

Moreover, even without the derivative jurisdiction doctrine, the claims against BPA and WAPA did not create subject matter jurisdiction because of those entities' sovereign immunity. "Sovereign immunity is jurisdictional in nature." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Thus, where a court finds a federal agency immune from suit, the appropriate remedy is dismissal under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. *E.g.*, *Angelides v. Baylor College of Medicine*, 117 F.3d 833, 835–37 (5th Cir. 1977); *Fordjour v. Sheets*, 143 Fed. Appx. 770, 772 (9th Cir. 2005); *Numrich v. United States Postal*

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[6] Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. 107-273, § 11020(b)(3)(A), 116 Stat. 1758, 1827 (2002), which redesignated former subsection (e) as (f) and amended the section as follows: "The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim."

[7] 14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3721, at 172 (Supp. 2006) ("New § 1441(f) limits the abrogation of the derivative jurisdiction doctrine to cases removed under 28 U.S.C.A. § 1441"). With this amendment, "Congress left no doubt that Section 1441(f) applies only to removals under Section 1441 and not to removals under any other section of the United States Code." *Barnaby v. Quintos*, 410 F. Supp. 2d 142, 144 (S.D.N.Y. 2005).

[8] Indeed, even before the 2002 amendment, the majority of the circuits addressing the issue had held that the derivative jurisdiction doctrine remained the law as to removals under 28 U.S.C. § 1442. *See Kasi v. Angelone*, 300 F.3d 487, 503 n.6 (4th Cir. 2002); *In re Elko County Grand Jury*, 109 F.3d 554, 555 (9th Cir. 1997); *Edwards v. United States Dep't of Justice*, 43 F.3d 312, 316 (7th Cir. 1994).

Service, No. CV-01-532-ST, 2002 WL 31440877 (D. Or. Jan. 3, 2002).[9]

4. *The District Court Ruled that It Had Not Obtained Subject Matter Jurisdiction Through the BC Hydro Removal Because of BC Hydro's Immunity*

The removal by BC Hydro, an immune foreign sovereign, also did not provide the district court with subject matter jurisdiction. Section 1604 of the FSIA, entitled "Immunity of a foreign state from jurisdiction," provides that "[a] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. Similarly, 28 U.S.C. § 1330(a) provides that "the district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity . . . ." Thus, as this Court pointed out in *Verlinden B.V. v. Central Bank of Nigeria*, "[i]f one of the specified exceptions to sovereign immunity applies, a federal district court may exercise subject-matter jurisdiction . . . but if the claim does not fall within one of the exceptions, federal courts lack subject-matter jurisdiction." 461 U.S. 480, 489 (1983); *accord Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

As the Ninth Circuit itself explained in *Security Pacific Nat'l Bank v. Derderian*, "federal jurisdiction over both foreign and non-foreign parties does not attach until it is

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[9] Amicus United States' argument that there was "removal jurisdiction" even if not "subject matter jurisdiction" does not account for or undercut the derivative jurisdiction analysis. *See Edwards*, 43 F.3d at 316. It is erroneous in any event, as discussed in Part I.C.3., below.

determined that the foreign sovereign lacks immunity from jurisdiction under the provisions of the FSIA." 872 F.2d 281, 283 (9th Cir. 1989). Thus, because the district court found BC Hydro immune, a decision which (like the BPA/WAPA decision) is now final, no jurisdiction was created by BC Hydro's removal.

5. *The District Court Ruled that It Had Not Obtained Subject Matter Jurisdiction Through the Powerex Removal Because Powerex Is Not a "Foreign State"*

Like BC Hydro, Powerex removed on the basis that it was "an agency or instrumentality of a foreign state," entitled to remove under sections 1441 and 1603. The district court found that it was not entitled to sovereign status, a decision that deprived the court of subject matter jurisdiction. Again, the text of 28 U.S.C. § 1330(a) is instructive: If there is no "foreign state," there is no subject matter jurisdiction under that statute. *See Linton*, 30 F.3d at 594.

In *Linton*, the district court held that the Airbus defendants, which had removed to federal court under the FSIA, did not qualify as instrumentalities of foreign states, and remanded for lack of subject matter jurisdiction. Airbus appealed, but the Fifth Circuit dismissed the appeal under section 1447(d), holding that the district court's remand, based on a determination that Airbus was not a foreign state, was jurisdictional and thus unappealable. *Linton*, 30 F.3d at 600; *accord Mobil Corp. v. Abeille Gen. Ins. Co.*, 984 F.2d 664, 666 (5th Cir. 1993).[10]

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[10] Powerex attacks *Linton* by claiming that it represents a minority view. However, Powerex is talking about a different issue discussed in *Linton*—whether it would matter if subject matter jurisdiction existed at the time of removal but was later lost. Pwx. Br. 44-45 n.54; *see* US Br. 8 n.3. We discuss this "timing" issue below in Part I.D.2., but emphasize here that the key holding of *Linton* and *Mobil* (that a remand based on lack of "foreign sovereign" status is a remand for lack of subject matter

Indeed, the situation in *Linton* (and here) is parallel to that described in *Kircher*:

> Once removal jurisdiction . . . is understood to be restricted to [preempted] actions . . . a motion to remand claiming the action is not [preempted] must be seen as posing a jurisdictional issue. . . . [T]he district court's order comes because its adjudicatory power has been exercised and its work is done. ***But its adjudicatory power is simply its authority to determine its own jurisdiction to deal further with the case. The work done is jurisdictional, as is the conclusion reached and the order implementing it.***

Kircher, 126 S. Ct. at 2155–56 (citations and footnotes omitted; emphasis added).

Here too, as to Powerex, BC Hydro, BPA and WAPA, the district court had "jurisdiction to decide its jurisdiction," but having done so, remanded for lack of subject matter jurisdiction. That is what the district court said it was doing, and what it was supposed to do, and even an error (not shown by Powerex) would not have made its decision appealable. *Kircher*, 126 S. Ct. at 2154 (review unavailable "no matter how plain the legal error"); *Osborn*, 127 S. Ct. at 895 (an appeal cannot be taken "whenever the district court misconstrues a jurisdictional statute").

C. The Bases upon Which the Ninth Circuit Accepted Jurisdiction Will Not Withstand Scrutiny

The Ninth Circuit held that it had jurisdiction because the issues on appeal were "substantive," "preceded the remand order," and were "apart from issues of jurisdictional or procedural defects leading to remand." Pet. App. 10a. These stated bases for jurisdiction have mostly been abandoned or

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jurisdiction) is not a minority position, is compelled by *Verlinden* and, indeed, Powerex has cited no authority to the contrary.

recast by Powerex, and, indeed, are not consistent with this Court's decisions under section 1447(d).

1. *The FSIA Rulings Neither "Preceded" the Remand Nor Were They "Apart From" It*

The determination that Powerex was not a foreign sovereign did not in any sense "precede" the district court's remand decision; it was part and parcel of the same decision, and no more "preceded" the remand decision than did the decision on preemption in *Kircher*. This "preceded" phraseology may be an invocation of *Waco v. United States Fid. & Guar. Co.*, 293 U.S. 140 (1934), where the district court dismissed a newly added party as unnecessary and improper, and then remanded the case because the dismissal had destroyed diversity jurisdiction. This Court found the dismissal appealable, but not the remand. *Id.* at 143-44; *see Kircher*, 126 S. Ct. at 2156 n.13. In this case, there is no separate ruling parallel to the dismissal in *Waco*. *Cf. id.* (the "remand order here cannot be disaggregated"); *Osborn*, 127 S. Ct. at 909 (Scalia, J., dissenting) (distinguishing *Waco* because the appeal in that case, if successful, "would not have subverted the remand" order, and thus there were plainly two "separate orders").[11]

Nor was the decision that Powerex was not a foreign sovereign "apart from" the remand decision. The Ninth Circuit has explained elsewhere:

> The district court's decision . . . rather than being apart from the question of subject matter jurisdiction, was necessary to determine whether such jurisdiction existed.

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[11] Powerex's new suggestion, not made below, that "disaggregation" along the lines suggested by Justice Souter's opinion in *Osborn* will help them here, is puzzling. It is not clear what can be disaggregated. The right to a bench trial from the right to a federal forum? One decision was made here—to remand—and it is unappealable. *See Kircher*, 126 S. Ct. at 2153-54.

> . . . In deciding whether subject matter jurisdiction exists, a district court will reach legal conclusions . . . . [Appellant] merely disagrees with the legal conclusion that the district court drew.

Hansen v. Blue Cross of California, 891 F.2d 1384, 1388 (9th Cir. 1989).

2. *Calling the Rulings "Substantive" Makes No Difference*

The Ninth Circuit erred because, at least since *Gravitt*, it has been clear that a jurisdictional remand is non-appealable no matter what type of legal issues underlie that jurisdictional holding. Indeed, the Seventh Circuit made this same mistake in *Kircher v. Putnam Funds Trust*, 373 F.3d 847, 850 (7th Cir. 2004), and was reversed by this Court. *Kircher*, 126 S. Ct. at 2154 (disagreeing with the court of appeals' view that its decision "rested simply on an application of ***substantive*** law" and finding instead that it was "dictated by its finding that it lacked removal jurisdiction") (emphasis added). *Spielman* also rejected the "substantive" label as not useful in this context, noting that the Ninth Circuit itself had limited the purported "substantive" exception to section 1447(d) to decisions which were not "necessary to determine whether subject matter jurisdiction existed." 332 F.3d at 129–130.

3. *The Court's Authority to Decide Its Jurisdiction Does Not Constitute Subject Matter Jurisdiction*

The Ninth Circuit stated that, "because BPA, WAPA and BC Hydro properly removed the case . . . [s]uch a removal removes the ***entire*** case . . . [and] the district court accordingly did not lack jurisdiction to decide the issues of immunity of BPA, WAPA and BC Hydro and of the sovereign status of Powerex." Pet. App. 10a. With respect, this is not only wrong as a matter of law, as discussed

immediately above, but is at best a disagreement with the district court on jurisdictional law, not a basis for appellate jurisdiction. *Osborn*, 127 S. Ct. at 895–96.

If the Ninth Circuit's view were correct, then in *Gravitt*, the district court would have had "jurisdiction" to decide estoppel, and the remand would not have been under section 1447(c). Similarly, under this theory, the district court in *Kircher* would have had "jurisdiction" to decide preemption, again evading section 1447(c). In neither case did this Court see it that way. The "power to decide" is what this Court called, in *Kircher*, the district court's "adjudicatory power . . . to determine its own jurisdiction to deal further with the case. ***The work done is jurisdictional, as is the conclusion reached and the order implementing it***." *Kircher*, 126 S. Ct. at 2155–56 (emphasis added). That is, the power to decide jurisdiction (and here immunity, which governs jurisdiction) does not itself constitute subject matter jurisdiction, and it does not take the remand outside sections 1447(c) and (d).

This also appears to be what amicus United States refers to in its discussion of "removal jurisdiction," which it seems to distinguish from "subject matter jurisdiction." US Br. 13–15. We are not aware of different meanings for these terms, and note that they are commonly interchanged for one another. *See Kircher*, 126 S. Ct. at 2151, 2153–56. If by "removal jurisdiction," the United States means the district court's technically proper receipt of a case upon the filing of a timely removal petition, subject of course to a remand motion, that is ***not*** subject matter jurisdiction. *See Gravitt*, 430 U.S. at 723–24. If, however, the Government means that subject matter jurisdiction on removal under section 1441(d) is broader than original jurisdiction under section 1330, there are several responses. First, this is merely another way of disputing the district court's holding that it did not have jurisdiction—it is not a way to make it appealable. Assuming arguendo that the district court had some sliver of subject matter jurisdiction

over BC Hydro's removal (or BPA's), that is, again, merely an error on a jurisdictional matter, not cognizable on appeal. *Kircher*, 126 S. Ct. at 2153.

Second, the United States appears to be wrong about the breadth of section 1441(d). *Verlinden* holds that a lack of sovereign immunity is a required element of subject matter jurisdiction under the FSIA. 461 U.S. at 493–94. True, *Verlinden* was not a removal case, but *Security Pacific* says the same thing in the removal context: "[F]ederal jurisdiction over both foreign and non-foreign parties does not attach until it is determined that the foreign sovereign lacks immunity." 872 F.2d at 283. And most significantly for appealability, *Security Pacific* says, "[w]hen a district court finds that a foreign sovereign is immune, 28 U.S.C. § 1447(c) mandates remand because the case 'was removed improvidently and without jurisdiction.' Section 1447(c) applies because the district court is ***without jurisdiction*** under 28 U.S.C. § 1330(a)." *Id.* at 284 n.6 (emphasis added).[12]

D. Powerex's Additional Arguments for Appellate Jurisdiction Are Mistaken

1. *The Remand Was Not of a Supplemental Claim*

Powerex's theory that this remand was not made pursuant to section 1447(c) requires it to identify an alternative ground, and it has identified supplemental jurisdiction. *See* 28 U.S.C. § 1367. This is convenient, because several lower courts have held that remands of supplemental claims are appealable notwithstanding section 1447(d). As we explain below in Part I.E., these holdings are erroneous. More critically, this was not a supplemental jurisdiction remand. First, the district

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[12] The only purportedly contrary case cited, *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), does not address appealability, and holds only that removal of a cross-claim brings with it the underlying claim, *id.* at 1064—a point never disputed here.

court did not say it was, but said it lacked subject matter jurisdiction as to all the cross-claims. Second, it could not have been a supplemental jurisdiction remand because supplemental jurisdiction requires that the court have jurisdiction over at least one claim, and there was none here.

Section 1367(a) provides for supplemental jurisdiction "in any civil action of which the district courts have original jurisdiction . . . ." Here, there was no original jurisdiction, and without original jurisdiction, there can be no supplemental jurisdiction. *Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 805–07 & n.3 (9th Cir. 2001). If the mere power to decide jurisdiction created jurisdiction to which supplemental jurisdiction could append, then *Kircher* and many other decisions could have come out the other way.[13]

2. *Subject Matter Jurisdiction Was Lacking from the Outset*

Powerex also asserts that an appeal is barred under section 1447(d) only if jurisdiction was lacking in the district court at the outset. Pwx. Br. 42–43. Powerex appears to have over-

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[13] Powerex relies on the Wright and Miller treatise and *District of Columbia v. Merit Sys. Prot. Bd.*, 762 F.2d 129 (D.C. Cir. 1985), ("*MSPB*"), for the proposition that the removal by BPA/WAPA could create supplemental or ancillary jurisdiction here. Pwx. Br. 45-46 & n.56. However, that treatise says only that federal jurisdiction created by federal agency removal supports supplemental jurisdiction which can survive even after the federal claim is "dismissed or settled." 14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure*, § 3727, at 171-72 (3d ed. 1998). This language does not appear to address dismissals for lack of subject matter jurisdiction. The important distinction between these situations is set out in *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 1244–45 (2006) (dismissal for lack of jurisdiction requires dismissal of supplemental claims, but dismissal on the merits permits retention of supplemental claims). *MSPB* presents a unique and confusing set of facts, but to the extent it holds that supplemental jurisdiction may exist even if original jurisdiction does not, it appears contrary to the weight of authority cited herein.

stated the lower courts' agreement on this issue,[14] and the assertion runs counter to the 1988 amendment to section 1447(c).[15] In any event, the district court ***never*** had subject matter jurisdiction. The court here, like the district court in *Kircher*, had the power to decide its jurisdiction, and nothing more. Unlike the situations in the cases cited by Powerex, nothing changed here. No federal claims were added, deleted, resolved or settled to extinguish jurisdiction. All that occurred was that the district court held at the first opportunity that it was without subject matter jurisdiction. The cases addressing remands based upon changes in circumstances are off-point.[16]

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[14] Although Powerex and the United States suggest that only *Linton* holds to the contrary, Pwx. Br. 44-45 n.54; *see* US Br. 8 n.3 (citing the same cases), it appears that the circuits are more badly split. *See* 16 James Wm. Moore, *Moore's Federal Practice* § 107.44 (3d ed. 2006).

[15] In 1988, 28 U.S.C. § 1447(c) was amended to substitute the present language: "If ***at any time before final judgment*** it appears that the district court lacks subject matter jurisdiction, the case shall be remanded," for the previous language: "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case . . . ." Judicial Improvements and Access to Justice Act of 1988, Pub. L. 100-702, § 1016(c)(1), 102 Stat. 4670. Given this language change, a remand because the district court had lost its previously existing jurisdiction is within section 1447(c) and an appeal would accordingly be barred by section 1447(d). The United States' contrary argument, as the Law Professors note (LP Amicus Br. 4-5), is based on legislative history that is inconsistent with statutory language. US Br. 9–10. The United States also attempts to provide policy reasons why such a "timing" exception makes sense, US Br. 11, but its argument is really directed against ***remands*** after events have occurred in the district court depriving it of jurisdiction, rather than in favor of ***appeals*** from such remands.

[16] Moreover, this is yet another spurious method around section 1447(d). Were Powerex (and the United States) correct on this point, it would have provided a far simpler basis for deciding *Osborn*. It could be said that the removal in *Osborn* was initially appropriate because of the Attorney General's certificate, and the remand came "later," after the dis-

3. *Remands Under the FSIA Are Not Exempt from Section 1447(d)*

Finally, Powerex asks this Court to create a new judicial exception, providing that all remands pursuant to the FSIA are exempt from section 1447(d). The short answer to this argument, never made below, is that the policy issues Powerex wishes to debate must be put to Congress.

As this Court has noted, "absent a clear statutory command to the contrary," the prohibition in section 1447(d) on appellate review "applies 'not only to remand orders made in suits removed under [the general removal statute], but to orders of remand made in cases removed under ***any other statutes***, as well.'" *Things Remembered*, 516 U.S. at 128 (quoting *Rice*, 327 U.S. at 752) (alteration in original). "We assume that Congress is 'aware of the universality of the practice' of denying appellate review of remand orders when Congress creates a new ground for removal." *Id.*

Indeed, where Congress has wished to create exceptions to section 1447(d), it has done so. Section 1447(d) itself excludes civil rights cases removed under section 1443. Two other statutes give the Resolution Trust Corporation and the Federal Deposit Insurance Corporation the right to appeal a remand order,[17] and another permits the United States to appeal remand orders in cases involving Indians.[18] Most

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trict court rejected the certificate and denied the motion to substitute. Although the Government presented this position in *Osborn*, US Br. 12-14, the Court did not address it. It proves far too much, and has no textual basis.

[17] *See* 12 U.S.C. § 1441a(1)(3)(C) (RTC "may appeal any order of remand entered by a United States district court"); 12 U.S.C. § 1819(b)(2)(C) (FDIC "may appeal any order of remand entered by any United States district court").

[18] *See* 25 U.S.C. § 487(d) ("the United States shall have the right to appeal from any order of remand" in a suit involving foreclosure or sale of "tribal land").

recently, the Class Action Fairness Act of 2005 ("CAFA") authorized "an appeal from an order of a district court granting or denying a motion to remand a class action to the State court" notwithstanding section 1447(d).[19]

Powerex argues that this Court's decision in *Osborn*, 127 S. Ct. 881, provides the basis for such an exception, but *Osborn* is quite different from this case. In *Osborn*, the Court addressed a provision of the Westfall Act, 28 U.S.C. § 2679(d)(2), which provides that in a state court suit against a federal employee, the Attorney General may certify that the employee was acting within his official duties. If the Attorney General does so, "[t]he certification of the Attorney General shall ***conclusively establish scope of office or employment for purposes of removal.***'" *Osborn*, 127 S. Ct. at 894 (quoting statute). The trial court in *Osborn* had rejected the Attorney General's certificate and remanded the case to state court. Given the clear statutory command that the certificate was "conclusive[] for purposes of remand," this Court held that "Congress gave district courts ***no authority*** to return cases to state courts on the ground that the Attorney General's certification was unwarranted." *Id.* (emphasis added).

This Court then had to resolve the direct statutory conflict between two "antishuttling provisions," the Westfall Act prohibiting remand after an Attorney General's certificate, and section 1447(d) prohibiting appeal of remand orders. The Court determined that the former prevailed, and an appeal could be taken. *Id.* at 895–96. But this Court cautioned that its holding was unique and could not be expanded to swallow the rule by being invoked "whenever the district court misconstrues a jurisdictional statute." *Id.* at 895. "Such an exception would, of course, collide head on with § 1447(d) and our precedent." *Id.* at 895–96. The Court concluded:

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[19] Pub. L. No. 109-2, § 5(a), 119 Stat. 4, 12 (to be codified at 28 U.S.C. § 1453(c)(1)).

"Only in the extraordinary case in which Congress has ordered the intercourt shuttle to travel just one way—from state to federal court—does today's decision hold sway." *Id.* at 896; *but see id.* at 901–02 (Souter, J., concurring and dissenting) and *id.* at 906–10 (Scalia, J., dissenting).

Thus, *Osborn*—and Justice Alito's similar opinion in *Aliota v. Graham*, 984 F.2d 1350 (3d Cir. 1993), which presciently predicted the holding in *Osborn*—do not help Powerex. They presented both a direct statutory conflict, not present here, and a close fit with *Thermtron*, where the district court was also "categorically preclude[d]" from remanding. *See Osborn*, 127 S. Ct. at 886. This case presents nothing similar.

Powerex also contends that the unavailability of appellate review of the remand (and the resultant loss of a bench trial) is contrary to our nation's foreign policy interests. That decision was Congress's to make, however. It granted a bundle of rights to foreign sovereigns, but those rights are limited. *See, e.g., Dole Food*, 538 U.S. at 477 (corporation owned indirectly by foreign government not covered by FSIA); *see also* 28 U.S.C. § 1605 (commercial exception to immunity). Where Congress has chosen to give only so much (including the right to seek removal) but no more (such as a right to appeal a remand) the judiciary will not override its policy decision. "To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926).

It must also be remembered that Powerex has never claimed immunity. Its position is that it must be an "organ," and must have an appeal, because otherwise, it will face litigation before a California judge and jury. But Congress has already made the determination that foreign entities can receive a fair trial in state court, because it did not grant federal courts ***exclusive*** jurisdiction over such parties, and this Court has said that state courts are "equally competent bod[ies]." *Kircher*, 126 S. Ct. at 2156. If this case proceeds in state court, Powerex will get a fair trial.

E. There Was No Remand of a Supplemental Claim Here, But Had There Been, It Too Would Have Been Unappealable

As Justice Kennedy noted in his concurring opinion in *Things Remembered*, 516 U.S. at 130, this Court has never decided whether discretionary remands of supplemental claims are appealable. While that question ought not be decided here, given that this remand was pursuant to section 1447(c), Powerex's repeated efforts to recast this as a supplemental claim remand compel an explanation as to why such appeals should not be permitted.

Nothing in the text of section 1447(d) suggests an exception for supplemental claims, nor would logic suggest that although legal errors about jurisdiction are unappealable, Congress intended that discretionary errors about retaining supplemental claims may be tied up on appeal for years. Indeed, if a distinction were to be drawn, the opposite regime would appear more rational, but Congress has prohibited ***both*** types of appeals.

Powerex is correct that some lower courts have not seen it this way, and that is because of the broad language (but not the holding) of *Thermtron*. *Thermtron* held only that remands concededly made upon a non-existent legal basis (*i.e.*, crowded docket) are appealable. The Court's recent *Osborn* decision announced a similar holding, and both cases presented extreme circumstances described by then-Judge Alito as remands based on "grounds that [the court] had no authority to consider." *Aliota*, 984 F.2d at 1357. By contrast, a remand of a supplemental claim, recognized as proper in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), is in no way similar to the flatly-unauthorized remands in *Thermtron* and *Osborn*. Indeed, after *Carnegie-Mellon*, a remand of a supplemental claim is the legal equivalent of a section 1447(c) remand and should be equally unappealable. *See id.* at 356 ("an entirely different situation is presented when the

district court has clear power to decline to exercise jurisdiction [and] *Thermtron* therefore does not control").

Thermtron stated that remands are ***only*** permissible for the reasons stated in section 1447(c), and therefore ***only*** such remands were intended by Congress to be unappealable. This formulation is, of course, no longer correct. In *Carnegie-Mellon*, this Court acknowledged that "[t]he language from *Thermtron* [about reading section 1447(c) *in pari materia* with 1447(d)] . . . is admittedly far-reaching, but it loses controlling force when read against the circumstances of that case." 484 U.S. at 355. Thus *Thermtron*'s apparent holding that section 1447(c) is the only legitimate basis for a remand was overruled in *Carnegie-Mellon*. So when this Court says in *Thermtron* that "we are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seemed justifiable to them," it surely was not talking about a case involving the legitimate remand of supplemental claims. 423 U.S. at 351.

Thus, if it becomes necessary to decide whether remands of supplemental claims are appealable, plaintiffs respectfully urge the Court to again cut back on the dicta, but not the holding, of *Thermtron*. Remands of supplemental claims bear no resemblance to the unauthorized remands in *Thermtron* and *Osborn*, nor to one other unique circumstance where remand orders are appealable.[20] Again, the plain text of section 1447(d) suggests that result, and a contrary result defies all logic and policy. No rational Congress would make that distinction, and our Congress has not done so in section 1447(d). *See Things Remembered*, 516 U.S. at 135

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[20] In *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), this Court accepted the concession of the parties, *id.* at 711, that an abstention-based remand issued by a court with admitted subject matter jurisdiction is appealable. *Id.* at 712.

(Ginsburg, J., concurring) ("It would show little respect for the legislature were courts to suppose that the lawmakers meant to enact an irrational scheme.").[21]

II. The Lower Courts Correctly Concluded that Powerex Is Not an "Organ" of British Columbia

If this Court concludes that the court of appeals had appellate jurisdiction, it must decide whether the Ninth Circuit erred in concluding that Powerex is not an "organ" of the British Columbia government within the meaning of the FSIA. As explained in detail below, the district court and the Ninth Circuit reviewed all the evidence relating to Powerex's purpose, structure and function, and the nature of its relation with the Provincial government, and applied the controlling legal principles to those facts. Both courts determined that Powerex had not satisfied its burden under the Act. Pet. App. 15a–16a, 35a–36a. The Court should not revisit those fact-intensive rulings. As the Court noted in *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830 (1996), it will not "'undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'" *Id.* at 840-41 (quoting *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)). No such error has been shown here.

A. To Be Deemed an "Organ of a Foreign State," an Entity Must Serve a Particular Governmental Function Under Active Supervision by the State

The threshold question in any FSIA determination is whether the entity in question is a foreign state, or the political subdivision, agency or instrumentality of a foreign state. 28

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[21] For similar reasons, remands that stem from post-removal events ought to be unappealable. *See Linton*, 30 F.3d 592. This is another spurious judicial exception to section 1447(d) stemming from the dicta in *Thermtron*.

U.S.C. § 1603(a). Section 1603(b)(2) provides that "agency or instrumentality" means any entity "which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." Because of the limited grant of certiorari, this case concerns only the "organ" prong of this provision.

As with any issue of statutory construction, the Court's analysis must begin with the statutory language, "and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (citation omitted). The Court should also consider the "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993).

Congress did not define "organ" in the statute or its legislative history; however, "the FSIA was not written on a clean slate." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612 (1992). The term "organ" has long been used by this Court when referring to a government-related entity, to mean a branch, arm or instrumentality of the government that performs a specific public function under the government's direction. *See, e.g.*, *Pasquantino v. United States*, 544 U.S. 349, 369 (2005) (the Executive Branch is "'the sole organ of the federal government in the field of international relations'").[22] This usage comports with the common dictionary definition of

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[22] See also *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) ("We have repeatedly recognized that state reapportionment is the task of local legislatures or those organs of state government selected to perform it."); *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 261 (1951) ("Courts, unlike administrative agencies, are organs with historic antecedents which bring with them well-defined powers.").

organ as "an instrumentality exercising some function or accomplishing some end," and specifically in the relevant context here, "a governmental instrumentality operating as a ***part*** of a larger organization." Webster's Third New International Dictionary 1589 (1993) (emphasis added).

The lower courts have developed a general framework for analyzing whether a particular entity may properly be characterized as an "organ" of a foreign state. Typically, the factors examined include "the circumstances surrounding the entity's creation, the purpose of its activities, its independence from the government, the level of government financial support, its employment policies, and its obligations and privileges under state law." *Patrickson*, 251 F.3d at 807.[23] From this body of case law, a consensus has emerged that, whatever precise form an "organ" might take, at a minimum, it must "engage in a public activity on behalf of the foreign government." *USX*, 345 F.3d at 208.

This requires that the entity perform a function that the government typically would undertake itself, and that it be subject to ***active***, not passive, supervision by the government. *See, e.g., Board of Regents of the Univ. of Texas Sys. v. Nippon Tel. and Tel. Corp.*, No. 05-51432, 2007 WL 273957, at *4 (5th Cir. Feb. 1, 2007) (active government supervision required); *Peninsula Asset Mgmt. (Cayman) v. Hankook Tire Co.*, 476 F.3d 140, 2007 WL 241294, at *3 (2d Cir. 2007) (entity performs "traditional government functions" relating to oversight of financial institutions); *USX*, 345 F.3d at 202, 210 (entity meets "organ" test where it was acquired by government to help ensure stability of Irish economy, and where it consults with government on all major decisions). The courts also agree that the "organ" determination is highly fact-specific. Not every factor will be present in every case,

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[23] *See also Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846–847 (5th Cir. 2000); *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir.), *cert. denied*, 543 U.S. 1022 (2004); *USX*, 345 F.3d at 206–207, 209.

and the court must analyze all the evidence from both a quantitative and qualitative standpoint. *See, e.g.*, *USX*, 345 F.3d at 209, 214; *Kelly*, 213 F.3d at 847.

The governmental-function and control requirements are consistent with the structure of the FSIA. As the United States points out, under the direct "ownership" prong of 28 U.S.C. § 1603(b)(2), all corporations in which the government directly owns a majority of shares are entitled to sovereign status regardless of purpose, function or governmental control. US Br. 20 (citing *Dole Food*, 538 U.S. at 474). Powerex has been held not to qualify under that prong of the statute. It is entirely plausible that Congress intended a different inquiry under the "organ" prong—one not focused on ownership but on function and control. As this Court noted in *Dole Food*, "control and ownership, . . . are distinct concepts." 538 U.S. at 477; *see also USX*, 345 F.3d at 211 ("We find that, although Congress favored ownership over control in the majority ownership prong, its use of the word 'organ' suggests an emphasis on control under the organ prong."). Both governmental function and active governmental control are therefore key elements of "organ" status.

Powerex and amici insist that the courts should apply the statute generously to accomplish Congress's goals. Pwx. Br. 22; BC Br. 7. A "broad" interpretation of the Act, they maintain, would "'be conducive to uniformity in decision.'" Pwx. Br. 20 (citing H.R. Rep. No. 94-1487, at 13 (1976) ("H.R. Rep.")); BC Br. 7. It is not clear why a broad interpretation (any more than a narrow one) would lead to consistency in decisions, but some courts accept this view. *See USX*, 345 F.3d at 207–08; *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1460 (9th Cir. 1995).[24]

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[24] As proof that Congress intended a broad construction of the term "organ," Powerex cites to Congress's statement in the legislative history that an "'agency or instrumentality of a foreign state' could assume a variety of forms," including, inter alia, "a state trading corporation, a

This argument ignores that other critical policy considerations also informed Congress's enactment of the FSIA. Thus, Congress recognized that "American citizens are increasingly coming into contact with foreign states and entities owned by foreign states." *Id.* at 6; *see Federal Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 624 (1983) ("*Bancec*"). "These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes." H.R. Rep. at 6.

In short, Congress realized that sovereignty determinations might leave injured parties without any forum, or more relevant here, might force them into a forum not of their choosing and deprive them of a jury trial. *USX*, 345 F.3d at 207–08 (broad federal jurisdiction under the FSIA has "significant procedural consequences, some of which a plaintiff likely will not welcome"). Therefore, "Congress sought to provide a more balanced legal posture between an injured private party and a foreign state-related defendant." Dellapenna, *supra*, at 31.

To protect this balance, an entity seeking "organ" status must demonstrate not only that it performs a specific governmental—not private—function, but also that the foreign government exercises meaningful control or supervision over

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mining enterprise . . . a shipping line or airline, a steel company, a central bank, [or] an export association[.]" H.R. Rep. at 15–16; *see* Pwx. Br. 22. In context, however, it is clear Congress was not specifically describing an "organ" here. It is more likely that Congress was describing what entities would qualify under the "ownership" prong of section 1603(b)(2), as virtually all of those mentioned are typical government-owned corporations. *See* Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations*, at 67 (2d ed. 2003) ("Dellapenna") (observing that the listed entities are "all typically structured as foreign-government-owned corporations"). Here Powerex has failed the "ownership" test. Pet. App. 16a.

its activities. *E.g.*, *USX*, 345 F.3d at 208, 212–13; *Kelly*, 213 F.3d at 846–48; *Patrickson*, 251 F.3d at 807–08. Requiring anything less would permit entities that are "only tangentially related to a foreign state" to claim foreign state status and its appurtenant privileges and protections, which "would be unfair to plaintiffs." *USX*, 345 F.3d at 208.

These words are particularly compelling here, where consumers chose to bring suit under California law in California's courts, only to find themselves removed to federal court (and deprived of a jury trial) by parties they did not even sue. An overly broad interpretation of "organ" would threaten the balance Congress sought to achieve.

B. Because Powerex Functions Like an Independent, for-Profit Private Enterprise, It Is Not an "Organ" of British Columbia

1. *Powerex Was Created for the Express Purpose of Maximizing Revenues—Typically a Private, Not Governmental, Function*

Powerex seeks to wrap itself in the mantle of sovereignty by recounting the history of the Columbia River Treaty and the formation of BC Hydro, and then portraying itself as just another instrumentality through which British Columbia seeks to exploit its natural resources. *See generally* Pwx. Br. 8–11. The courts' role, however, is to determine an entity's status as of the time the lawsuit was filed, not as of the date of its creation. *Dole Food*, 538 U.S. at 478. The proper focus of the inquiry, therefore, is on Powerex's current activities.

Powerex contends that its function is to "maximize the ***value*** of [the Province's] hydroelectric resources," and this supposedly constitutes the most important evidence of the company's "organ" status. Pwx. Br. 11 (emphasis added); *see id.* at 8, 18–19; BC Br. 4. This highlights a critical distinction between Powerex and BC Hydro. BC Hydro manages the Province's hydroelectric resources to ensure

reliable power for British Columbia. Pet. App. 32a, 50a; JA 116. By contrast, Powerex is principally engaged in power trading for profit, just like Duke, Reliant and Enron. Indeed, on its homepage Powerex portrays itself not as an arm of the British Columbia government, but as "a leading marketer of wholesale energy products and services in western Canada and the western United States, and a growing niche player in other markets across North America." *See* http://www.powerex.com.

Powerex was created in 1988 to market British Columbia's surplus hydroelectric power "in a manner that maximized the benefits [*i.e.*, the revenues] to all British Columbians." *See* Pet. App. 53a. In other words, Powerex's function was not to manage a Provincial resource, like BC Hydro, but simply to sell surplus power at the highest possible price. *See* JA 201 (Powerex was intended "merely to drive a good bargain in the U.S.A."); Pwx. ER 0782, 0784 (Powerex's CEO agreed that company's purpose is not to support BC Hydro's operations, but rather "to provide the Province with as much money as [it] can given [its] capabilities"). To be sure, the development and exploitation of a country's natural resources may be a characteristic function of government. *See, e.g.*, *Kelly*, 213 F.3d at 848. Seeking out profit-making opportunities, however, is not. Courts have recognized the distinction between serving an important governmental purpose and profit-seeking, and the latter purpose weighs against "organ" status. *See, e.g.*, *USX*, 345 F.3d at 210; *EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co.*, 257 F.3d 992, 998 (9th Cir. 2001); *Kelly*, 213 F.3d at 847.

Powerex emphasizes that all of its profits benefit the people of British Columbia. Pet. Br. 26–27. The test under the FSIA, however, is not whether an entity's activities "benefit" the foreign state, but whether the entity performs a characteristically governmental function. *See Peninsula Asset*, 476 F.3d 140, 2007 WL 241294, at *3 (entity performs

"traditional government functions" of overseeing country's financial institutions). Indeed, if engaging in conduct that happens to "benefit" a foreign state were a sufficient "governmental" function, a great many more entities might qualify for "organ" status than Congress ever could have intended.[25] In *Board of Regents*, 2007 WL 273957, the Fifth Circuit rejected a similar argument. There, a telecommunications entity claimed that its enabling statute required it to provide universal service to Japan—plainly, a benefit to the Japanese people. But the court held that it was only one of a number of entities operating in a competitive field, and it "clearly serves market ends, ***not*** a government function, such as intervening to prevent 'a public financial crisis.'" *Id.* at *4 (quoting *USX*, 345 F.3d at 211).

The evidence shows that in Powerex's current broad-ranging energy trading business, selling British Columbia's surplus power is not one of Powerex's ***principal*** functions. JA 236; *see Dole Food*, 538 U.S. at 478 (courts examine status as of filing of lawsuit). The trading of Canadian Entitlement power, which Powerex touts as emblematic of its governmental status, accounts for only about fifteen percent of Powerex's sales. JA 251. Powerex buys power from 150–200 different sources, more than 70% of them located in the United States, not Canada. *Id.* With the exception of BPA, Powerex's principal, self-described competitors are private corporations, such as Duke. JA 252. And in addition to its electricity trading operation, Powerex now buys and sells natural gas in the United States, ***none*** of it acquired from BC Hydro. JA 249.

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[25] Powerex and amicus British Columbia emphasize that Powerex was granted the "exclusive" right to export surplus hydroelectric power. Pwx. Br. 25; BC Br. 12. Powerex acknowledges, however, that if it were not performing that function, neither the Province itself nor BC Hydro would be performing it. Pet. App. 59a–60a; BC Br. 12. This in itself is powerful evidence that what Powerex was created to do is not a typical function for the British Columbia government.

Finally, Powerex contends that its "governmental" role has expanded over the years to include (1) assignment of the Province's rights and obligations under the Columbia River Treaty; (2) performance of Provincial obligations under the Skagit River Treaty and the British Columbia-Seattle Agreement; and (3) responsibility under the Power for Jobs Development Act for providing subsidized energy to domestic businesses. Pwx. Br. 26. The first of these is addressed below in Part II.B.4. As for the remaining two, Powerex has failed to meet its burden to demonstrate the magnitude of these roles. It could very well be de minimis, or many of Powerex's functions may long since have been completed, in which case, these activities would have little bearing on whether Powerex now primarily performs governmental functions.[26]

2. *Powerex Was Incorporated and, in Most Respects, Functions Like Any Privately-Held Corporation, with Only Superficial Oversight by the British Columbia Government*

This Court has observed that while separately-constituted governmental entities may vary in organization and control, they tend to share certain common characteristics. For example, "[a] typical governmental instrumentality . . . is created by an enabling statute that prescribes [its] powers and duties . . . and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law." *Bancec*, 462 U.S. at 624. Powerex was not created in this fashion.

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[26] For instance, Powerex claims that it "took the lead" in re-negotiating certain aspects of the Seattle agreement. Pwx. Br. 12. There is no evidence that this was anything other than a one-time task, and it appears to have no bearing on the activities that are the subject of the cross-claims against it.

Powerex was incorporated under the Company Act of British Columbia, and nothing in its Articles of Incorporation distinguishes it from any other ordinary privately-held corporation. JA 252–53; Pwx. ER 0236–60. By contrast, BC Hydro was created by legislation specifying in detail its powers, its legal rights and obligations, and how its directors are to be selected. Pet. App. 163a–189a. Similarly, BPA, WAPA and the government corporations mentioned by Powerex and the amici are all creatures of Congressional statutes that specify their powers, rights and obligations.[27] The lack of enabling legislation evidences Powerex's essentially private nature. In *Gates*, 54 F.3d 1457, the court found that the lack of day-to-day supervision over the hog marketing board's activities did not preclude "organ" status. But there, unlike here, "the Province's laws and regulations narrowly circumscribe[d] the entity's ability to act independently." *Id.* at 1461. What the Ninth Circuit found lacking here was any similar evidence of the Province's ability to "narrowly circumscribe [Powerex's] ability to act independently."

Powerex complains that the Ninth Circuit improperly ignored or discounted evidence that the Province "supervises Powerex's operations in a variety of ways," and that the company receives certain benefits as a government-related corporation. Pwx. Br. 28, 31. But the evidence of ***active*** supervision is weak. Powerex points to the fact that its financial results are consolidated with those of BC Hydro for accounting purposes, its board of directors is appointed by BC Hydro directors, it does not pay Canadian or Provincial income taxes, and it is subject to certain financial reporting requirements applicable to government-related entities. *Id.* at

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[27] *See, e.g.*, 16 U.S.C. § 832a (BPA); 42 U.S.C. §§ 7152, 7275 (WAPA); 16 U.S.C. § 831 (Tennessee Valley Authority); 36 U.S.C. § 300101 (Red Cross).

27–31. These factors, however, do not amount to the type of close supervision required under the case law.

For example, in *Board of Regents*, 2007 WL 273957, at *4, the Fifth Circuit concluded that the type of government authorizations granted to the Japanese government there, including the ***direct*** appointment of board members (not present here) and the approval of profit distributions, do not constitute "***active*** supervision," because if it did, "***any*** regulated public-service provider could claim sovereign status." *Id.*; *see also Patrickson*, 251 F.3d at 808 (nature of relationship with government there, similar to that present here, "is not considerably different from the control a majority shareholder would enjoy under American corporate law").

Moreover, an entity may be designated as "public" for certain purposes, and yet still not be subject to active governmental oversight. *See Board of Regents*, 2007 WL 273957, at *5 (being designated a public institution for disaster prepared-ness purposes does not make entity an "organ"). That is the case here. Powerex's exemption from taxation does not suggest that the Province is actively overseeing Powerex's activities, and the weight to be given Powerex's duties under some Provincial reporting laws is diminished by the fact that it is not included among the "public bodies" subject to at least one important public accountability law—British Columbia's Freedom of Information and Protection of Privacy Act, R.S.B.C. ch. 165 (1996) ("FIPPA").[28]

Powerex also asserts that the Province "control[s] . . . Powerex's financial exposure by a risk-management committee . . . that reports periodically to British Columbia's

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[28] The stated purpose of the FIPPA is "to make public bodies more accountable to the public" by "giving the public a right of access to [their] records . . . ." Appendix 1a. BC Hydro is listed among the "public bodies" subject to FIPPA, but Powerex apparently is not. Appendix 4a-5a.

Ministry of Finance." Pwx. Br. 29. Significantly, before the Ninth Circuit, BC Hydro sharply denigrated the degree of parental oversight reflected in this risk management policy. *See* Answering Brief of Appellee BC Hydro, filed in Reliant Appeal, at 37–40 (9th Cir. July 28, 2003). As BC Hydro showed, and Powerex's Treasurer admitted, there is nothing unique or particularly significant about these policies, and the lower courts were entitled to give them little or no weight. JA 226–27.

In other respects, Powerex functions much like any private energy company. It is undisputed that, as the district court concluded, "Powerex ***independently*** determines the quantity of BC Hydro surplus power to export, and ***independently*** determines what parties it will trade with and on what terms." Pet. App. 30a (emphasis added). Powerex is regulated like other private energy companies. JA 257–58. Significantly, however, it possesses no regulatory authority itself. JA 260. This factor also weighs against a finding of "organ" status under the FSIA. *Patrickson*, 251 F.3d at 808.

3. *Powerex's Employees Share in Its Profits, Enjoy Bonuses and Are Not Civil Servants*

Powerex insists that "its revenue does not result in any private profit" and "[o]nly the Province . . . ultimately benefit[s] from any income generated by Powerex's operations." Pwx. Br. 26. Apart from the fact that, as shown, profit-making does not constitute performance of a government function, this assertion omits one key fact: A substantial part of Powerex's revenues are used to pay large employee bonuses.

It is undisputed that Powerex's employees are not classified as civil servants. Pwx. Br. 34. They are selected solely by Powerex; no Provincial authority has any role in their selection. JA 260. They are not paid according to Provincial guidelines for public employees. JA 242. Courts routinely

conclude that the absence of civil service employees weighs heavily against a finding of "organ" status. *See, e.g., Board of Regents*, 2007 WL 273957, at *5; *USX*, 345 F.3d at 213.

More significantly, all of Powerex's approximately 120 employees are entitled to share in the company's profits through a bonus plan. JA 245. In this regard, Powerex's CEO testified that Powerex has "a bonus compensation program that's unique. No one else in the public service has anything like it." JA 242. Of the total employees, fifty to sixty energy traders are eligible for "larger" bonuses. JA 245. The bonus pool consists of a percentage of Powerex's net income, and recently has amounted to approximately $4–5 million per year. JA 245–46. Government employees do not typically receive five- or six-figure bonuses.

Powerex avoids ***any*** mention of these bonuses. Instead, it suggests that its employee compensation plans can be ignored in the "organ" analysis because its private employees' salaries are subject to "political" constraints. *See* Pwx. Br. 34–35; JA 242. This evasion will not wash. The type of "political" pressure that might keep a lid on salaries and bonuses exists in both the public and private spheres, and is not the equivalent of civil service constraints.

4. *Powerex Deals with BC Hydro at Arm's Length*

Powerex leans heavily on the Province's assignment to Powerex of its rights to receive Canadian Entitlement power. Pwx. Br. 10–11, 26. This fact does not help Powerex. With respect to the Canadian Entitlement and otherwise, Powerex deals with BC Hydro at arm's length, just as any private power marketer would do.

Before entering into the agreement with Powerex, the Province solicited and received competing proposals from Enron and from a consortium of other private entities,

including Duke, for the rights to market this power in the United States. JA 253. Powerex beat out those private concerns for the Province's business. Under the agreement, Powerex is required to pay the Province the "fair market value of Canadian Entitlement" power. JA 141.[29] In addition, as the district court noted, the Assignment Agreement expressly provides that:

> Powerex will not be or be construed as the agent of the Province and will be entitled to deal with the Canadian Entitlement Rights assigned to it under this Agreement as it sees fit without consultation with the Province. Any profits or losses with respect to sales of the Canadian Entitlement will be solely for the account of Powerex.

JA 151.

The United States criticizes the district court's reliance on this language, asserting that it is little more than a precautionary bit of legalese to clarify that Powerex is not the alter ego of the Province for liability purposes. US Br. 23 n.8. This utterly misses the significance of this language, which is one more piece of evidence belying Powerex's claim that it is subject to active oversight by British Columbia.

Powerex operates from this strictly arm's-length posture in its other dealings with BC Hydro as well. It sells power to BC Hydro at current market rates, regardless of how much Powerex paid for the power, and it buys power from BC Hydro at market rates, regardless of how much Powerex is able to get for that power. JA 254–55. And while BC Hydro performs certain services for Powerex (e.g., acting as its

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[29] The agreement contains an arbitration clause, incorporating commercial arbitration rules, in the event the parties disagree as to the price that Powerex should pay to the Province for Canadian Entitlement power. JA 149. Powerex included this clause because "[w]e will not pay them whatever they ask." JA 254.

payroll agent), "it's the same as an external service would be," and Powerex pays BC Hydro for those services at market rates. JA 220–23.[30]

C. The Ninth Circuit Carefully Weighed the Foregoing Factors and Properly Found Powerex's Evidence Wanting

The lower courts examined all of the evidence presented by the parties and concluded that, on balance, Powerex was not an "organ of a foreign state." Pet. App. 15a–16a, 35a–36a. The district court found particularly compelling the fact that "Powerex is not subject to the type of active governmental oversight" that characterized the government's role over the Alberta regulatory agency described in *Gates*, 54 F.3d at 1461. Pet. App. 35a. The Ninth Circuit weighed the same, essentially uncontroverted facts, and reached the same conclusion. *Id.* at 15a–16a. In other words, both courts did precisely what they were supposed to do.

Powerex and amici vigorously contend that the Ninth Circuit departed significantly from the accepted standards governing the "organ" determination, principally by "disregarding" Powerex's "public purpose" and instead resting its decision on the absence of certain indicia of government control. *See, e.g.*, Pwx. Br. 33; BC Br. 2, 4; US Br. 6–7. This fundamentally misconstrues both the Ninth Circuit's approach and the governing law. First, it was entirely appropriate, indeed necessary, for the court of appeals to consider not only the purposes Powerex serves (and it ***did*** consider its purposes (Pet. App. 16a)), but also the lack of British Columbia's

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[30] Indeed, the British Columbia Utilities Commission has determined that Powerex and BC Hydro deal with one another at arm's length. In 2000, the Commission "acknowledged that Powerex would not be a public utility if it acts at arms-length from B.C. Hydro." JA 275. Ultimately, the Commission concluded that Powerex in fact was not a public utility, based on additional information provided by BC Hydro. JA 255–56.

control over the company's activities. *See USX*, 345 F.3d at 211 (indicating that Congress's "use of the word 'organ' suggests an emphasis on control under the organ prong"). The fact that the court of appeals found especially significant Powerex's "high degree of independence" from governmental control (Pet. App. 16a) does not mean that the court did not consider all pertinent factors. It simply means that the court found the balance of factors did not favor "organ" status.

Powerex argues that not every factor needs to be present for "organ" status to be established. Pwx. Br. 24. But just as courts have noted that the presence of certain factors may be entitled to considerable weight, so too, the ***absence*** of key factors may have particular significance. *See, e.g.*, *USX*, 345 F.3d at 212–15. Here, the evidence emphasized by Powerex, even viewed collectively, simply could not compensate for Powerex's failure to demonstrate that its trading activities are subject to Provincial supervision or control, or that it principally performs a public function. In fact, by the time of the cross-claim here, Powerex had evolved into a typical energy marketing and trading company that engages primarily in the characteristically private endeavor of making profits from its operations and sharing those profits with its employees, unconstrained by active governmental oversight.[31]

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[31] Powerex and amici assert that the Ninth Circuit should not have added into the mix factors such as the company's lack of immunity from suit, and its indirect ownership by the Province. Pwx. Br. 34–36; US Br. 26–27. Courts have held, however, that the nature of the entity's ownership relationship with the foreign government properly ought to be considered under the "organ" prong, because it is relevant to determining "the degree to which an entity is performing a function 'on behalf of the foreign government.'" *USX*, 345 F.3d at 209. Similarly, a lack of immunity from lawsuits weighs against a finding of "organ" status. *Patrickson*, 251 F.3d at 808. At the very least, these factors indicate that an entity is not so intimately connected with the state itself that it is protected by the state's shield from lawsuits, or that the state manages its daily operations.

D. The Foreign-Relations Concerns of Amici and Powerex Are Properly Addressed to Congress, Not This Court

Powerex and amici warn that, unless the Ninth Circuit's decision is reversed, foreign governments will take great offense at being forced to defend themselves before state judges and juries, and adverse foreign-relations consequences will result. Pwx. Br. 36–38; BC Br. 22–24; Canada Br. 6–8, 11.

The "views" of a foreign state in a case such as this one may be relevant, but only insofar as they relate to how the foreign state treats its related entities. *E.g.*, *USX*, 345 F.3d at 207; *Kelly*, 213 F.3d at 847. This Court is not obliged to pay heed to Canada's or British Columbia's ***political*** concerns, or mere preferences, regarding American litigation against Canadian-related entities. While a foreign state can express its views about the impact of a litigation to the political branches, "it is quite a different matter to suggest that courts—state or federal—will tailor their rulings to accommodate the expressed interests of a foreign nation that is not even a party." *Patrickson*, 251 F.3d at 803. Canada and British Columbia should direct their concerns to Congress if they wish a broader definition of "organ" or the "ownership" prong. *See Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983) ("This Court has little competence in determining precisely when foreign nations will be offended by particular acts.").[32]

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[32] This Court should also decline amici's invitations to interpret the FSIA according to comity principles or other nations' interpretations of their own sovereign immunity laws. *See* Canada Br. 9–11; BC Br. 9–10. When it enacted the FSIA, Congress provided that sovereignty determinations "should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602. Additionally, amici ignore that comity and other principles of international law are already subsumed into the substantive and procedural standards set forth in the FSIA. *See F. Hoffman-LaRoche*

Powerex further contends that the failure to recognize it as an organ of British Columbia, while according sovereign status to WAPA and BPA, violates article 1102 of the North American Free Trade Agreement. Pwx. Br. at 38–39; Pet. App. 147a. This argument incorrectly assumes that the lower courts had no rational basis for distinguishing Powerex from BPA and WAPA. In fact, these federal agencies are quite different from Powerex in their creation, structure and function. Both were formed by federal statutes that prescribe their function, both operate as a part of the Department of Energy, and both have Administrators who report directly to the Secretary of that Department. *See* 16 U.S.C. § 832a; 42 U.S.C. §§ 7152, 7275. Unlike Powerex, they are not profit-seeking entities, and are more similar to BC Hydro (indisputably, a sovereign entity) than to Powerex. *See generally* http://www.wapa.gov/about/default.htm; http://www.bpa.gov/corporate/About_BPA. Perhaps most significantly, in this litigation no one disputed the sovereign status of BPA or WAPA.

CONCLUSION

The judgment of the court of appeals should be vacated because that court lacked jurisdiction to review the district court's remand order. Alternatively, the judgment should be affirmed because Powerex is not an "organ" of British Columbia.

Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) (courts "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws"); *see also Verlinden*, 461 U.S. at 488–89; H.R. Rep. at 6–7, 10–13. Additionally, resort to foreign sources—assuming that is appropriate at all—is unnecessary here. This Court has available to it a wide variety of domestic sources from which to discern Congress' intended meaning of "organ." Finally, the authorities cited by amici are not helpful. They all concern whether or not to grant immunity, but that is not an issue here. *See* BC Br. 9–10; Canada Br. 10.

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APPENDIX

APPENDIX

CONSOLIDATED STATUTES OF BRITISH COLUMBIA

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

Part 1—Introductory Provisions

R.S.B.C. 1996, c. 165

1. Definitions

Schedule 1 contains definitions of terms used in this Act.

2. Purposes of this Act

(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

(a) giving the public a right of access to records,

(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,

(c) specifying limited exceptions to the rights of access,

(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

(e) providing for an independent review of decisions made under this Act.

(2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

3. Scope of this Act

(1) This Act applies to all records in the custody or under the control of a public body,

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FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

Part 6—General Provisions

76. Power to make regulations

(1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the Interpretation Act.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:

* * *

(n) for any purpose contemplated by this Act.

(5) A regulation made under subsection (1) or (2) may provide differently for different classes of public bodies.

76.1 Ministerial regulation making power

(1) The minister responsible for this Act may, by regulation, amend Schedule 2 to do one or more of the following:

(a) add to it any agency, board, commission, corporation, office or other body

(i) of which any member is appointed by the Lieutenant Governor in Council or a minister,

(ii) of which a controlling interest in the share capital is owned by the government of British Columbia or any of its agencies, or

(iii) that performs functions under an enactment;

(b) designate or change the designation of the head of a public body;

(c) delete from it an agency, board, commission, corporation, office or other body that

(i) no longer exists, or

(ii) no longer meets the criteria established by paragraph (a)

* * *

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

Schedule 1

(Note: see section 1)

Schedule 1

Definitions

In this Act:

* * *

"head", in relation to a public body, means

(a) if the public body is a ministry or office of the government of British Columbia, the member of the Executive Council who presides over it,

(b) if the public body is designated in, or added by regulation to, Schedule 2, the person designated as the head of that public body in that Schedule or by regulation,

* * *

"local government body" means

(a) a municipality

(b) REPEALED, SBC 2003 52 (a) effective January 1, 2004 (D.C. Reg. 465/2003)

(c) a regional district,

(d) an improvement district as defined in the Local Government Act,

(e) a local area as defined in the Local Services Act,

* * *

(m) a library board as defined in the Library Act,

(n) any board, committee, commission, panel, agency or corporation that is created or owned by a body referred to in paragraphs (a) to (m) and all the members or officers of

which are appointed or chosen by or under the authority of that body,

* * *

"local public body" means

(a) a local government body,

* * *

"minister responsible for this Act" means the member of the Executive Council charged by order of the Lieutenant Governor in Council with the administration of this Act;

* * *

"public body" means

(a) a ministry of the government of British Columbia,

(b) an agency, board, commission, corporation, office or other body designated in, or added by regulation to, Schedule 2, or

(c) a local public body

but does not include

(d) the office of a person who is a member or officer of the Legislative Assembly, or

(e) the Court of Appeal, Supreme Court or Provincial Court;

* * *

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

Schedule 2

(Note: see Schedule 1, definitions of "head" and "public body")

Public Bodies

[Schedule 2]

* * *

Public Body:	British Columbia Hydro and Power Authority
Head:	Chair of the Board of Directors

* * *

Public Body:	Plumbing Code Advisory Committee
Head:	Minister of Community, Aboriginal and Women's Services Public
Body:	Power Engineers and Pressure Vessel Safety Advisory Committee
Head:	Minister of Community, Aboriginal and Women's Services Public
Body:	Power Engineers and Pressure Vessel Safety Appeal Board
Head:	Minister of Community, Aboriginal and Women's Services Public
Body:	Premier's Advisory Council for Persons with Disabilities
Head:	Minister of Education, Skills and Training Public
Body:	Premier's Advisory Council on Science and Technology
Head:	Minister of Advanced Education

* * *

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No. 05-85

IN THE

Supreme Court of the United States

POWEREX CORP.,
Petitioner,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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April 6, 2007

CORPORATE DISCLOSURE STATEMENT

Petitioner's Rule 29.6 Statement was set forth at page vii of its opening brief, and there are no amendments to that Statement.

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Under the multi-factor approach adopted by every court of appeals except the Ninth Circuit, Powerex Corp. is an "organ" of British Columbia within the meaning of the Foreign Sovereign Immunities Act of 1976 ("FSIA"). Instead of defending the Ninth Circuit's rigid three-part test, respondents offer their own restrictive two-part test, which no court has adopted. The Court should reverse and hold that an entity is an organ when, considering all relevant factors, it serves a public purpose and that Powerex meets that standard.

Respondents devote the bulk of their brief to advancing a novel approach to subject-matter jurisdiction under the federal-officer and FSIA removal statutes that lacks support in this Court's cases. Under well-settled precedent, the district court had subject-matter jurisdiction upon the proper removal of the case under 28 U.S.C. §§ 1441(d) and 1442. The court did not lose that jurisdiction when it concluded that the Bonneville Power Administration ("BPA"), Western Area Power Administration ("WAPA"), and BC Hydro were entitled to immunity. Accordingly, the district court did not remand the case for lack of subject-matter jurisdiction under 28 U.S.C. § 1447(c), and 28 U.S.C. § 1447(d) therefore does not apply.

ARGUMENT

I. POWEREX IS AN "ORGAN" UNDER THE FSIA

Under the proper, fact-sensitive analysis, Powerex is an organ of British Columbia – a conclusion that the British Columbia and Canadian governments have endorsed in briefs that respondents admit (at 49) are relevant here. *See* Pet. Br. 20-32; U.S. Br. 20-25; B.C. Br. 11-21; Canada Br. 4. Respondents purport to agree that courts should employ a multi-factor, fact-sensitive analysis to evaluate FSIA organ status and that "[n]ot every factor will be present in every case." Resp. Br. 35-36. But they disregard the factors that courts universally apply and, instead, treat as dispositive two criteria – whether the entity performs a "characteristically" governmental function and whether it is subject to active government supervision.

Id. at 35-39. That test finds no support in the FSIA's text, structure, purposes, or history.

A. Respondents' Two-Part Test For Organ Status Conflicts With The FSIA

1. Although respondents do not specify what is a "governmental function" that satisfies the first part of their test, they apparently concede that Powerex engages in "a characteristic function of government" – "exploitation of a country's natural resources." Resp. Br. 39. They assert, however, that an entity's function is no longer "governmental" when the entity performs the function for profit.

But whether an entity seeks profits cannot be dispositive of its organ status. The FSIA's text, structure, and history demonstrate that Congress intended the term "organ" to include commercial entities. *See* Pet. Br. 20-22. Commercial entities, by their nature, seek to take in more money than they spend. *See, e.g.*, 49 U.S.C. § 24301(a)(2) ("Amtrak . . . shall be operated and managed *as a for-profit corporation*") (emphasis added).

The relevant question therefore is not whether an entity generates profits; it is whether those profits benefit *the public*. *See* Pet. Br. 21-22, 35. On that issue, to the extent that Powerex's income exceeds its costs, the *only* beneficiaries are the Province (Powerex's sole owner through its statutory agent, BC Hydro) and the Province's ratepayers. *See id.* at 26-28; U.S. Br. 25; B.C. Br. 18-20. In this way, Powerex is no different from BPA, which markets power and uses "[m]oney generated from surplus [power] sales [to] keep power rates . . . low,"[1] and it is even more governmental than the second Bank of the United States, which had "shareholders other than the United States." *Lebron v. National R.R. Passenger Corp.*,

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[1] *See* BPA, *Who Are We?*, http://www.bpa.gov/corporate/About_BPA/. That belies respondents' claim (at 50) that BPA is "quite different" from Powerex. Both entities were created by their governments to market locally generated power for public benefit.

513 U.S. 374, 387 (1995); *see* Ralph C.H. Catterall, *The Second Bank of the United States* 22 (1903).[2]

Respondents' active-supervision requirement similarly conflicts with the Act's text. To be an organ, an entity must be a "separate legal person" and thus have some level of independence from the government that created it. 28 U.S.C. § 1603(b)(1). Requiring "active" supervision would defeat many of the benefits that governments gain by incorporating separate legal entities to conduct commercial functions for public benefit. *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 624-25 (1983) ("distinctive features" of instrumentalities permit them "a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies"). Because organ status is a contextual inquiry that turns on no single factor, it makes far more sense to evaluate "the degree of supervision by the government," *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 209 (3d Cir. 2003), rather than simply labeling the supervision "active" or "passive."

2. Respondents' only attempt to ground their proposed test in the FSIA's text is to claim (at 36) that, because this Court has held that governmental control is not relevant under the "ownership" prong of § 1603(b)(2), *see Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003), governmental function and control therefore must be relevant under the "organ" prong. That is a non sequitur. In recognizing that "[c]ontrol and ownership . . . are distinct concepts," *id.*, this Court did not purport to address the meaning of the FSIA's organ prong.

Respondents' principal support for their test comes from snippets of cases from other contexts and a dictionary definition. *See* Resp. Br. 34 & n.22. But each of those

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[2] *Board of Regents v. Nippon Telephone & Telegraph Corp.*, 478 F.3d 274 (5th Cir. 2007), did not hold (as respondents suggest (at 40)) that an entity can be denied organ status despite having no private shareholders; a majority of that entity's shareholders were private. *See id.* at 279.

sources apparently refers to an "organ" as a part of the sovereign itself. *See Pasquantino v. United States*, 544 U.S. 349, 369 (2005) (President of the United States); *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 261 (1951) (Frankfurter, J., dissenting) (courts); *Webster's Third New Int'l Dictionary* 1589 (2002) ("a governmental instrumentality operating as a part of a larger organization" – *e.g.*, "the cabinet's function as a general [organ] of government"); *see also Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) ("organ[] of state government" created to reapportion legislative districts). That cannot be the meaning of "organ" Congress intended in the FSIA because, to be an organ, an entity must be a "legal person" that is "separate" from the foreign state itself. 28 U.S.C. § 1603(b)(1). *Cf. Booth v. Churner*, 532 U.S. 731, 737-39 (2001) (looking to "broader statutory context" and "statutory history" rather than dictionary definitions urged by the parties).

In searching for support in the FSIA's purposes, respondents allude (at 37) to Congress's desire to provide fairness to plaintiffs by rationalizing the process for determining foreign entities' entitlement to immunity from suit. *See* H.R. Rep. No. 94-1487, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605; S. Rep. No. 94-1310, at 6 (1976). But they offer no support for the claim that Congress wanted suits against sovereigns brought in state courts.[3] To the contrary, as a trade-off for giving plaintiffs the ability to sue foreign states, Congress expressly granted foreign states their choice of forum, *see Ruggiero v. Compania Peruana de Vapores*, 639 F.2d 872, 878 (2d Cir. 1981) (Friendly, J.), and expressed a strong preference for having cases involving foreign states heard in

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[3] Respondents are mistaken in claiming (at 38) that they could be deprived of a jury trial by foreign sovereigns they did not even sue. Respondents' claims against Reliant and Duke could have been tried to a jury. *See In re Air Crash Disaster*, 96 F.3d 932, 943 (7th Cir. 1996).

federal court, *see Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983).[4]

3. No court of appeals decision on which respondents rely (at 35) supports their restrictive two-factor test. Rather, in each one, the court evaluated at least five factors, none of them dispositive. *See Nippon*, 478 F.3d at 279-80; *Peninsula Asset Mgmt. (Cayman) v. Hankook Tire Co.*, 476 F.3d 140, 143 (2d Cir. 2007); *USX*, 345 F.3d at 209-13. Those courts did not require that the entity "perform a function that the government typically would undertake itself," as respondents claim (at 35); rather, they considered "whether the foreign state created the entity for a national purpose." *Nippon*, 478 F.3d at 279; *accord Peninsula*, 476 F.3d at 143; *USX*, 345 F.3d at 209. Powerex readily meets that standard. *See* Pet. Br. 25-26.[5] To be sure, courts consider "government supervision of the entity," *id.* at 24, and some have used the label "active" (though not in the way respondents do), but other courts have not, *see USX*, 345 F.3d at 209; *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 640 (9th Cir. 2003), and there is no basis in the FSIA to employ it.

B. The Record Evidence Requires Reversal

Respondents' analysis of the record evidence fares no better than their proposed test for organ status.

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[4] Moreover, any fairness inquiry here surely weighs in Powerex's favor, as the Federal Energy Regulatory Commission has found no merit in allegations of wrongdoing by Powerex during California's "energy crisis." *See* Joint Explanatory Statement at 3, *Powerex Corp.*, Docket Nos. EL03-166-000 & EL03-199-000 (FERC filed Oct. 31, 2003) (finding "no probative evidence that Powerex engaged in or facilitated any" prohibited trading practices and concluding that "Powerex was a valuable and reliable supplier of energy and ancillary services to the California organized markets throughout the period"), *available at* http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=9933358.

[5] While some of the decisions on which respondents rely concluded that the foreign entity performed "traditional government functions," that was sufficient – but not necessary – to demonstrate that the entity was created "for a national purpose." *Peninsula*, 476 F.3d at 143.

1. Respondents erroneously assert (at 9, 33) that the Court should not resolve the question on which it granted certiorari because the lower courts made "factual" findings that Powerex is not an organ of British Columbia. But the historical facts of this case are reflected in the record and the lower courts' opinions, and they are undisputed. Powerex challenges the lower courts' misinterpretation of the FSIA and their misapplication of the Act to those facts – issues on which this Court owes no deference to the lower courts. *See Ornelas v. United States*, 517 U.S. 690, 697-98 (1996) (applying *de novo* review to "control" and "clarify" legal standard that, like organ status, cannot be articulated with precision, but "acquire[s] content only through application"); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995) (questions of law reviewed *de novo*); *see also* Pet. Br. 25 n.24 (citing FSIA cases in which this Court has independently applied the law to the facts of the case).

2. Respondents contend (at 38-41) that Powerex does not perform a public activity because it engages in energy trading. But Powerex's participation in wholesale electricity markets within the United States allows the Province to maximize the value of its hydroelectric resources by exporting energy when available and, when necessary, importing energy to replace depleted Provincial resources. *See* Pet. App. 58a (Peterson Decl.); JA 235-37, 238-39 (Peterson Dep.). Indeed, respondents concede (at 39) that, in maximizing the value of the Province's natural resources, Powerex serves a public purpose. *See* Pet. App. 16a.[6]

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[6] In seeking to minimize the concededly public nature of that activity, respondents note (at 40 n.25) that, if Powerex did not exist, BC Hydro would not take over the function of selling power in the United States. *See* Pet. App. 24a, 59a-60a; JA 237-38 (Peterson Dep.). If Powerex did not exist, British Columbia power would be sold at the border in a less profitable manner. JA 236 (Peterson Dep.). But Powerex *does exist*; the Province ordered its creation; and it has been performing the public function of exporting provincially generated hydropower for nearly 20 years. Respondents also mention (at 40) Powerex's natural-gas transactions, which make up "[l]ess than 5 percent" of Powerex's

Respondents also admit (at 41) that Powerex's governmentally assigned duties have expanded over the years to include treaty negotiation and performance on behalf of Canada and the Province, and subsidization of domestic industry. Respondents claim, however, that Powerex bears a burden to demonstrate the "magnitude" of those roles. They cite no authority for such a burden because none exists. *See S&S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 414 (2d Cir. 1983). Moreover, the record reflects that Powerex has played a substantial – and ongoing – role in shaping and executing Canada's and British Columbia's obligations to provide power to Seattle under international pacts. *See* Pet. Br. 11-12.[7]

Respondents also assert (at 38, 40) that the circumstances of Powerex's creation are irrelevant to the organ-status inquiry because in *Dole Food* the Court considered the entity's characteristics at the time the suit was filed. *See* 538 U.S. at 478. But, there, the Court was interpreting § 1603(b)(2)'s majority-ownership prong, which turns on an entity's current ownership structure. On the organ prong, when (as here) the entity's basic structure and functions have remained constant, it makes little sense to ignore relevant evidence of the entity's creation, as courts have recognized. *See Nippon*, 478 F.3d at 279; *Peninsula*, 476 F.3d at 143; *USX*, 345 F.3d at 209-11; *EIE Guam*, 322 F.3d at 640.[8]

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revenues, JA 249 (Peterson Dep.). Some of those purchases are "for the natural-gas plants in the BC Hydro system," C.A. E.R. (PWX) 0802 (Peterson Dep.), and thus directly benefit the Province.

[7] Contrary to respondents' suggestion (at 41 n.26), that role is relevant even though this suit did not arise out of those activities. The organ-status inquiry includes consideration of all relevant characteristics of the entity at issue. It is unlike the FSIA's commercial-activity exception, which explicitly directs the court to consider whether the suit is "based upon" the commercial activity. 28 U.S.C. § 1605(a)(2); *see Saudi Arabia v. Nelson*, 507 U.S. 349, 357-58 (1993) (interpreting § 1605(a)(2)).

[8] Moreover, contrary to respondents' claim (at 41-42), the creation of Powerex by a directive of the Province's Minister of Energy rather than

3. In addition, respondents claim (at 42-44) that the British Columbia government does not adequately supervise Powerex. Even if respondents' active-supervision requirement were consistent with the FSIA, Powerex meets that requirement, as respondents' principal authority shows. Unlike Japan, whose supervision the Fifth Circuit deemed "not active" in *Nippon*, British Columbia does not merely duplicate the oversight "of other governments' regulatory bodies." 478 F.3d at 279-80. Instead, provincially appointed BC Hydro directors make up a majority of Powerex's board and Powerex must comply with numerous statutes that do not apply to private-sector firms. *See* Pet. Br. 29-31; B.C. Br. 17-18. Respondents thus wrongly claim that "Powerex is regulated like other private energy companies." Resp. Br. 44. *See also Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004) (deeming the governmental supervision "active" simply because the government appointed the organ's president and directors, and "overs[aw]" "many of its operations").[9]

4. Respondents make much (at 44-45) of the fact that Powerex pays performance bonuses to its employees. Powerex pays those bonuses "to be competitive" with the

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a statute makes little difference because government instrumentalities are often created by administrative order. *See, e.g.*, Reorganization Plan No. 3 of 1970, § 1(a) ("[t]here is hereby established the Environmental Protection Agency"), *available at* http://www.epa.gov/history/org/origins/reorg.htm; *see also Lebron*, 513 U.S. at 388-91. In fact, Southwestern Power Administration, Southeastern Power Administration, and Alaska Power Administration all were created by Department of Interior Secretarial Orders. *See* United States Dep't of Energy, General Records of the Department of Energy § 434.3, http://www.archives.gov/research/guide-fed-records/groups/434.html.

[9] Respondents note (at 43-44) that the use of a risk-management committee is not unique to Powerex. But they fail to mention that, unlike a typical private-sector risk-management committee, Powerex's committee reports to British Columbia's Ministry of Finance. *See* Pet. Br. 29. Moreover, Powerex has that committee because, as a government body, it was required to be subject to one in order to transact in commodity derivatives. *See* Commodity Derivatives by Government Bodies Regulation, B.C. Reg. 407/2000 (Pet. Br. Add. 43); Pet. Br. 30.

private sector in hiring personnel, while retaining a compensation level for Powerex's traders that remains only "at the median of the Canadian market." JA 242 (Peterson Dep.). Many United States governmental entities similarly compensate employees above the government pay scale to compete with the private sector in hiring.[10] Moreover, unlike private firms, the compensation paid to Powerex's employees is publicly available – placing Powerex at a competitive disadvantage in retaining high-performing personnel. *See, e.g.*, BC Hydro, *Financial Information Act Return* at 85 (2006), *available at* http://www.bchydro.com/rx_files/policies/policies48313.pdf.

5. Finally, Powerex's relationship with BC Hydro is not inconsistent with its being an organ of the Province, as respondents claim (at 45-47). When the two company's financial statements are consolidated, transactions between them are eliminated. *See* JA 220 (Lambert Dep.) Moreover, accounting for those transactions enables the Province to identify inefficiencies as between Powerex and BC Hydro that would otherwise be obscured. *See* JA 201 (Minister of Energy testifying that ratepayers will not

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[10] *See, e.g.*, 5 U.S.C. § 4802(b) ("[t]he [Securities and Exchange] Commission may appoint and fix the compensation of such officers, attorneys, economists, examiners, and other employees as may be necessary for carrying out its functions under the securities laws"); Dave Flessner, *TVA Cuts Employee Bonuses*, Chattanooga Times (Free Press, TN), Dec. 16, 2006 (TVA president compensated $1.6 million for fiscal year; TVA nuclear chief compensated nearly $1.3 million; TVA paid $40 million in "year-end performance payments to . . . employees"; "TVA paid its 143 top executives another $10.5 million in bonuses"); Jacqueline Trescott & James V. Grimaldi, *Smithsonian's Small Quits in Wake of Inquiry*, Wash. Post, Mar. 27, 2007, at A1 (head of Smithsonian paid $884,733 in salary, plus bonuses, and a $1.15 million housing allowance over six years); FDIC, *Career Questions and Answers, General Employment Questions* ("The FDIC is a government corporation, and does not follow the pay scales on the General Schedule (GS). While we are part of the competitive civil service, our positions [are] paid on our own rate of pay[.]"). http://www.fdic.gov/about/jobs/jobs_questions.html.

subsidize export activity).[11] Although the Province considered other entities to market the power received from the United States under the Columbia River Treaty, the Province chose Powerex because of its "superior knowledge of the hydroelectric system in British Columbia and the Pacific Northwest" and its "mastery of all the details of the Treaty" – benefits that "outweigh[ed]" the "commercial advantages that the other competitors might have brought to the table." JA 231 (Peterson Dep.).[12]

II. SECTION 1447(d) DOES NOT APPLY HERE

The unusual circumstances of this case can be resolved under well-settled principles of appellate jurisdiction. Section 1447(d) applies only to cases remanded under 28 U.S.C. § 1447(c). *See Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976). The district court did not remand this case under § 1447(c) because, as it initially and correctly held (Pet. App. 20a), the entire action was "properly removed" under the federal-officer removal statute, 28 U.S.C. § 1442, and the FSIA's removal provision, *id.* § 1441(d). Those removal statutes conferred subject-matter jurisdiction on the district court over the entire case, which included the claims against Powerex, regardless of whether Powerex is independently entitled to remove under the FSIA. *See* Pet. Br. 41-42, 45-46. After the district court resolved the immunity defenses of the federal agencies and BC Hydro, it had the power to

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[11] While (as respondents note (at 47 n.30)) the British Columbia Utilities Commission has accepted Powerex's separate legal status, the Commission also concluded that "the actions of BC Hydro with respect to electricity trade are very important to the welfare of ratepayers." JA 277. Thus, the Commission forcefully underscored the key role Powerex plays in enabling BC Hydro to meet provincial objectives.

[12] Independently, respondents suggest (at 49) that this Court should not consider the FSIA's purpose of promoting harmonious foreign relations. Although courts need not bow to diplomatic pressure in resolving particular cases under the Act, *see Verlinden*, 461 U.S. at 488, the statute still must be interpreted in light of its purposes, *e.g.*, *McCreary County v. ACLU*, 545 U.S. 844, 861 (2005) ("[e]xamination of purpose is a staple of statutory interpretation").

decide the remaining claims against Powerex. *See id.* at 45-46; *cf. Osborn v. Haley*, 127 S. Ct. 881, 896 (2007).

Because the district court had (and never lost) statutory subject-matter jurisdiction over the claims against Powerex, its decision to remand those claims must be understood as a discretionary decision not to exercise supplemental jurisdiction conferred on it by § 1442 and § 1441(d). Section 1447(d) does not bar appellate review of such discretionary remand orders because they are not based on a lack of subject-matter jurisdiction under § 1447(c); rather, they are based on a district court's discretionary decision to decline to exercise its subject-matter jurisdiction. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 355 n.11 (1988); *Thermtron*, 423 U.S. at 346; Pet. Br. 45-46.

Respondents devote the bulk of their brief to presenting various claims that the court below lacked appellate jurisdiction. Those arguments fundamentally misunderstand principles of federal jurisdiction applicable in cases removed by federal agencies and foreign sovereigns.

A. The Immunity Of BPA, WAPA, And BC Hydro Did Not Require Remand Under § 1447(c)

Respondents contend (at 17-21) that the district court's remand order must have been issued under § 1447(c) because federal and foreign sovereign immunity, and the so-called "derivative-jurisdiction" doctrine, prevented the district court from acquiring subject-matter jurisdiction over this case when it was removed from state court. Lack of immunity is not a requirement for statutory subject-matter jurisdiction under either § 1442 or § 1441(d). Instead, Congress conferred subject-matter jurisdiction in those removal provisions based on the type of entity being sued – foreign sovereign or federal officer – and not the nature of the claim brought against it. The court's resolution of immunity does not divest the court of jurisdiction under either removal statute.

1. Respondents' contention exploits the familiar confusion surrounding the term "jurisdiction" – "a word of

many, too many, meanings." *Rockwell Int'l Corp. v. United States*, No. 05-1272, slip op. at 9 (U.S. Mar. 27, 2007) (internal quotation marks omitted). Under the usual application of § 1447(c), a district court will conclude that it lacks subject-matter jurisdiction over a removed action because it could not have exercised original jurisdiction over the action. *See* 28 U.S.C. § 1441(a). For example, a district court lacks jurisdiction when either the plaintiff's well-pleaded state-court complaint fails to present a federal question that confers jurisdiction under 28 U.S.C. § 1331, *e.g.*, *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983), or complete diversity is lacking at the time of removal, precluding jurisdiction under 28 U.S.C. § 1332, *see Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 564 (2005) (under § 1441(a), "absent complete diversity a case is not removable"). When the district court undertakes one of those "threshold inquir[ies]," *Osborn*, 127 S. Ct. at 895, and determines that the requirements of the removal statute have not been satisfied, § 1447(c) directs the district court to remand the case.

By contrast, the federal-officer and foreign-sovereign removal provisions entail a different threshold jurisdictional inquiry. If the removing defendant qualifies as a foreign state or as a federal officer or agency (with a colorable federal defense and acting under color of office, *see Jefferson County v. Acker*, 527 U.S. 423, 431 (1999)), then the requirements for removal are satisfied and the entire case is properly removed.[13] A district court's decision on

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[13] Respondents do not dispute that BPA, WAPA, and BC Hydro properly invoked § 1442(a) and § 1441(d) or that, when a federal agency or a foreign state properly removes an action to federal court, the entire case is removed. *See* Resp. Br. 25 n.12; Pet. App. 20a. Courts have so held under both § 1442, *see, e.g.*, *District of Columbia v. MSPB*, 762 F.2d 129, 132 (D.C. Cir. 1985) (per curiam); *Johnson v. Showers*, 747 F.2d 1228, 1229 (8th Cir. 1984); 14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3727, at 168-69 & nn.74-75, Supp. at 105 n.74 (3d ed. 1998 & Supp. 2006) ("Wright & Miller") (citing cases from the Second, Fifth, Ninth, and Tenth Circuits), and § 1441(d), *see, e.g.*, *Davis v. McCourt*,

an immunity defense occurs only *after* the court obtains jurisdiction over the case under § 1442(a) or § 1441(d).

Although sovereign immunity has been described as "jurisdictional," *FDIC v. Meyer*, 510 U.S. 471, 475 (1994), nothing in the text of either § 1442 or § 1441(d) requires that the removing defendant lack immunity from suit as a precondition for statutory subject-matter jurisdiction to attach under those provisions. Unlike § 1441(a), neither provision requires that the case could have been brought originally in federal court. Rather, when a sovereign defendant removes under § 1442 or § 1441(d) and asserts immunity, the district court has subject-matter jurisdiction to resolve the entire case (although before proceeding on the claims against the removing defendant it must resolve the substantive question whether that defendant is immune from suit). That conclusion comports with this Court's cases recognizing that the resolution of an immunity defense requires the application of substantive federal law. *See Osborn*, 127 S. Ct. at 896; *Verlinden*, 461 U.S. at 493-94, 497.[14]

2. Respondents' theory, by contrast, requires the absurd conclusion that § 1447(c) mandates a district court to remand a suit against an immune sovereign to state court. That rule would defeat § 1442's and § 1441(d)'s purpose of permitting federal agencies and foreign sovereigns to have their immunity defenses adjudicated in a

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226 F.3d 506, 509-11 (6th Cir. 2000) (citing cases from four other circuits); *see also Norsyn, Inc. v. Desai*, 351 F.3d 825, 827 n.2 (8th Cir. 2003); *USX*, 345 F.3d at 197, 216.

[14] Respondents rely (at 19-20, 25) on a Ninth Circuit decision, *Security Pacific National Bank v. Derderian*, 872 F.2d 281 (9th Cir. 1989), that fundamentally misinterpreted the FSIA by holding that the requirements of the Act's original-jurisdiction provision, § 1330(a), must be met for the district court to have subject-matter jurisdiction under § 1441(d). *See* 872 F.2d at 283-84 & n.6. Unlike § 1330(a), § 1441(d) does not limit jurisdiction to claims "with respect to which the foreign state is not entitled to immunity." 28 U.S.C. § 1330(a). *Compare* Reply Br. Add. 1 (§ 1330) *with* Pet. Br. Add. 4 (§ 1441).

federal forum,[15] because the state court would be free to revisit and reject that defense on remand, *see Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145, 2157 (2006).

3. Nothing about the "discredited doctrine of derivative jurisdiction," 14C Wright & Miller § 3727, at 170, on which respondents rely (at 17-18), justifies the result they urge. Congress has eliminated the doctrine in cases removed under § 1441. *See* 28 U.S.C. § 1441(f). To the extent it retains validity in cases under § 1442, the upshot is that a district court should *dismiss* – not remand – a case removed from state court when the state court did not have jurisdiction to adjudicate it. *See Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 382-83 (1922), *superseded by statute*, 28 U.S.C. § 1441(f).[16]

4. Contrary to respondents' assertions (at 21, 24), sovereign immunity is unlike the jurisdictional issues that this Court faced in *Kircher* and *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977) (per curiam). Under the Securities Litigation Uniform Standards Act ("SLUSA") at issue in *Kircher*, a case is removable only if the Act precludes the suit from being brought at all. *See* 126 S. Ct. at 2155. Thus, SLUSA preclusion is a prerequisite for statutory subject-matter jurisdiction under SLUSA's removal provision. Whether SLUSA precludes a

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[15] *See Verlinden*, 461 U.S. at 489, 497; *Willingham v. Morgan*, 395 U.S. 402, 407 (1969); *see also Colorado v. Symes*, 286 U.S. 510, 517 (1932) (federal-officer removal statute is "to be liberally construed").

[16] *See also, e.g.*, 14B Wright & Miller § 3721, at 304 ("The effect of the [derivative-jurisdiction doctrine's] application was a dismissal of the action by the district court."). None of the cases cited by respondents even suggests that remand was appropriate. *See Kasi v. Angelone*, 300 F.3d 487, 503-04 (4th Cir. 2002) (describing a prior circuit decision in which the court affirmed a district court's entry of judgment on the merits in favor of the government in a case removed under § 1442); *In re Elko County Grand Jury*, 109 F.3d 554, 555 (9th Cir. 1997) (affirming district court's refusal to remand case removed under § 1442); *Edwards v. U.S. Dep't of Justice*, 43 F.3d 312, 314-17 (7th Cir. 1994) (affirming the district court's entry of judgment on the merits in favor of the government in a case removed under § 1442).

suit is thus analogous to whether a particular defendant is a federal agency under § 1442(a)(1) – they are both requirements for removal. The validity of a federal defense of sovereign immunity, by contrast, is a substantive question that the court addresses *after* determining that the requisites of the removal statute have been satisfied.

Nor does *Gravitt* help respondents. There, the basis for removal was diversity of citizenship. The district court remanded the case as "improperly removed," after concluding that, at the time of removal, the parties were not completely diverse. 430 U.S. at 723. Thus, like *Kircher*, *Gravitt* remanded on the ground that the requisites of the removal statute were not met at the time of removal.

B. The District Court Never Lost Jurisdiction Over The Claims Against Powerex

Respondents suggest (at 26 n.13) that the district court lost jurisdiction over the claims against Powerex after concluding that the federal agencies and BC Hydro were immune from suit. The D.C. Circuit has correctly rejected that assertion, holding that a district court does not lose jurisdiction over claims against non-sovereign defendants simply because a removing federal agency has been dismissed as immune. *See MSPB*, 762 F.2d at 131-33.[17]

Respondents' principal justification for their contention – a citation to *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1242 (2006) – does not support them. This Court stated in *Arbaugh* that, when a federal court dismisses a federal claim for lack of subject-matter jurisdiction, it cannot

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[17] Other courts also have recognized that principle under both § 1442 and § 1441(d). *See IMFC Prof'l Servs. of Fla., Inc. v. Latin Am. Home Health, Inc.*, 676 F.2d 152, 156, 158-59 (5th Cir. Unit B 1982) (§ 1442); 14C Wright & Miller § 3727, at 166-68, 171 (same); *In re Surinam Airways Holding Co.*, 974 F.2d 1255, 1258-60 (11th Cir. 1992) (§ 1441(d)); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1375-78 & n.6 (5th Cir. 1980) (same); 14C Wright & Miller § 3729.1, at 239-43 (same); *cf.* 28 U.S.C. § 1367. *But cf. Schlumberger Indus., Inc. v. National Sur. Corp.*, 36 F.3d 1274, 1284-85 (4th Cir. 1994) (case must be remanded when plaintiff voluntarily dismisses foreign sovereign immediately after removal).

exercise supplemental jurisdiction under 28 U.S.C. § 1367. *Id.* at 1244-45. But the Court made that statement while analyzing whether a complaint stated a federal claim that gave rise to jurisdiction under § 1331. The Court did not purport to address cases such as this one in which a court possesses and exercises jurisdiction under § 1442 or § 1441(d) and concludes that the removing defendant is immune from suit. *Cf. Rosado v. Wyman*, 397 U.S. 397, 402-05 (1970) (mootness of main claim does not destroy power to decide supplemental claim).

Furthermore, even if the district court lost jurisdiction over the claims against Powerex once it resolved the immunity defenses of the federal agencies and BC Hydro (and assuming that Powerex is not an organ of British Columbia), the district court's remand order would not have been authorized under § 1447(c) because that provision authorizes remand only when the district court lacks subject-matter jurisdiction *at the time of removal*. *See* Pet. Br. 42-45; U.S. Br. 8-11.[18] Respondents briefly dispute that point in a footnote (at 27 n.15), but they ignore the structure and history of § 1447(c) and this Court's recognition that subject-matter jurisdiction is determined when the federal court's jurisdiction is invoked.

C. Section 1447(d) Does Not Apply To Discretionary Remands Of Supplemental Claims

Respondents' claim (at 31-33) that this Court should apply § 1447(d) to orders remanding claims within the court's supplemental jurisdiction – such as in this case and *Cohill* – is inconsistent with this Court's cases and unsupported by the policy of § 1447(d).

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[18] Respondents apparently believe that petitioner and the United States should have cited *Adkins v. Illinois Central Railroad Co.*, 326 F.3d 828 (7th Cir. 2003), *cited in* 16 James Wm. Moore et al., *Moore's Federal Practice* ¶ 107.44[2][a][iii] (3d ed. 2006). *See* Resp. Br. 26-27 & n.14. But that case did not hold that post-removal events can trigger a lack of jurisdiction within the meaning of § 1447(c); it held that "[t]he present case, in our view, is best regarded as one in which the court never had any jurisdiction over the claim." *Adkins*, 326 F.3d at 833.

Respondents cannot dispute that *Thermtron* held that "only remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from review under § 1447(d)." 423 U.S. at 346. Nor can they dispute that *Cohill* held that § 1447(c) "do[es] not apply" to discretionary decisions to remand rather than to exercise supplemental jurisdiction. 484 U.S. at 355 n.11. Indeed, to hold that § 1447(d) applies here, the Court essentially would have to overrule *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1976), which held that § 1447(d) was "inapplicable" to a discretionary "abstention-based remand order" because it "does not fall into either category of remand order described in § 1447(c)." *Id.* at 712.[19] Although respondents assert (at 31) that "a remand of a supplemental claim is the legal equivalent of a section 1447(c) remand," the language of § 1447(c) provides no support for that assertion.[20] When the federal court *has* jurisdiction – as in the *Cohill* and abstention contexts – a remand is not *mandatory* under § 1447(c) and must therefore be discretionary. *Cf. Rockwell*, slip op. at 10 n.6.

Perhaps recognizing that the type of discretionary remand order at issue here is reviewable under settled law, respondents' *amici* urge this Court to overrule *Thermtron* – a decision the Court has reaffirmed no less than four times, most recently this Term. *See Osborn*, 127 S. Ct. at 893, 895; *Kircher*, 126 S. Ct. at 2153; *Quackenbush*, 517 U.S. at 711-12; *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28 (1995). Notably, respondents do not join that argument. *See* Resp. Br. 32. For that reason alone,

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[19] Although, as respondents note, no party urged the application of § 1447(d) in *Quackenbush*, this Court analyzed and resolved that issue, *see* 517 U.S. at 711-12, presumably to satisfy its obligation to ensure its own jurisdiction, *see, e.g., Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 593 (2004).

[20] In claiming that § 1447(c) covers all remands, *see* Public Citizen Br. 7-8, respondents' *amici* read the word "defect" out of the statute by applying § 1447(c) to all remand orders, even where (as here) there was no defect in removal. *See, e.g., Autoridad de Energia Electrica de Puerto Rico v. Ericsson Inc.*, 201 F.3d 15, 17 (1st Cir. 2000).

this Court should decline to accept *amici*'s invitation to reexamine its 30-year-old decision in *Thermtron*.[21]

Additionally, the Court should reject *amici*'s call to reexamine *Thermtron*'s settled construction of § 1447(c) and (d) because of the "special force" that *stare decisis* has in matters of statutory interpretation. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (internal quotation marks omitted).[22] *Thermtron* held that § 1447(c) and (d) "must be construed together." 423 U.S. at 345. That rule has its roots in cases decided more than 60 years ago.[23] Although Congress has twice amended § 1447(c) since *Thermtron*, *see* Pet. Br. 43-44 & n.52, it has taken no action to alter the rule set forth in that decision. Thus, "Congress has had [more than] 30 years in which it could have corrected [the Court's] decision in [*Thermtron*] if it disagreed with it, and has not chosen to do so." *Hilton*, 502 U.S. at 202.

Permitting appellate review of *Cohill* remand orders does not conflict with the policy underlying § 1447(d). Congress intended that provision to prevent "prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *United States v. Rice*, 327 U.S. 742, 751 (1946). When, as here, the district court has subject-matter jurisdiction under two different removal statutes, the concern articulated in *Rice* is not present because the district court's "jurisdiction" is not in "ques-

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[21] *See, e.g., Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991) ("we do not ordinarily address issues raised only by *amici*"); *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981).

[22] *See, e.g., Shepard v. United States*, 544 U.S. 13, 23 (2005); *Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 78 n.10 (1999); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977); *Flood v. Kuhn*, 407 U.S. 258, 282-84 (1972).

[23] *See Kloeb v. Armour & Co.*, 311 U.S. 199, 202 (1940) (the predecessors of § 1447(c) and (d) "'are in pari materia, [and] are to be construed accordingly rather than as distinct enactments'") (quoting *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 380 (1937)).

tion[]." *Id.* Here, appellate review ensures that the district court's decision not to exercise supplemental jurisdiction comports with the "strict duty to exercise the jurisdiction that is conferred upon [federal courts] by Congress." *Quackenbush*, 517 U.S. at 716. That is particularly true in this case because the federal-officer and foreign-sovereign removal statutes embody a strong congressional preference for a federal forum. *See supra* note 15.

D. The District Court Did Not Clearly Purport To Remand For Lack Of Subject-Matter Jurisdiction Under § 1447(c)

Finally, respondents claim that, regardless of whether the district court in fact had jurisdiction here, § 1447(d) bars appellate review because the district court "purported" to remand for lack of subject-matter jurisdiction. Although respondents spend three pages dissecting the remand order (at 12-15), they fail to identify either a statement by the district court that it was remanding because it lacked subject-matter jurisdiction or a citation to § 1447(c). The remand order contains no clear explanation of why the district court felt compelled to remand *the entire case* – which it had held was "properly removed," Pet. App. 20a – after concluding that the federal agencies and BC Hydro were immune from suit and that Powerex was not an organ of British Columbia.[24] At most, respondents have established that the order is ambiguous. But, even if the district court had purported to remand for lack of subject-matter jurisdiction, it would still be necessary to inquire further to determine whether the remand order

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[24] *Compare Kircher*, 126 S. Ct. at 2158 (Scalia, J., concurring in part and in the judgment) ("'Because the Court lacks subject matter jurisdiction, the Court **REMANDS** this action[.]'") (quoting district court order); *id.* at 2153 (majority) ("The District Court said that it was remanding for lack of jurisdiction[.]"). Although respondents rely heavily on the district court's after-the-fact characterizations of its remand order, they fail to explain how a district court can purport to remand a case under § 1447(c) by citing that provision only in orders issued *more than a month after the remand order*.

was based on the resolution of an issue of "subject matter jurisdiction" within the meaning of § 1447(c). The Court undertook precisely that kind of analysis in *Kircher*. *See* 126 S. Ct. at 2154-55; Pet. Br. 47.[25]

Respondents and their *amici* also observe that the remand order does not contain a balancing of the discretionary factors set forth in *Cohill*. But, because *Cohill* did not authorize district courts to remand supplemental claims without making "a proper determination that retaining jurisdiction over the case would be inappropriate," 484 U.S. at 357, the district court's failure to conduct the proper *Cohill* analysis before remanding makes this case like *Osborn*, *Quackenbush*, and *Thermtron*, where this Court reviewed and reversed unauthorized remand orders. The failure to conduct a balancing does not make this case anything like *Gravitt*, where the district court remanded the case as "improperly removed" after determining that complete diversity was lacking at the time of removal – a remand order that was "*plainly* within the bounds of § 1447(c)." 430 U.S. at 723 (emphasis added).[26]

CONCLUSION

The judgment should be reversed insofar as it held that Powerex is not an organ of British Columbia.

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[25] Respondents seize on a sentence in a footnote in *Kircher* that observed that the district court in that case had understood itself to be making a jurisdictional ruling. *See* 126 S. Ct. at 2155 n.12. But the bulk of that footnote was devoted to bolstering the Court's conclusion that SLUSA remands are in fact remands for lack of subject-matter jurisdiction under § 1447(c). *See id.* The Court did not hold that the district court's characterization of the issue as jurisdictional was dispositive. *See id.* at 2154 (evaluating whether "the District Court *was correct* in understanding its remand order to be dictated by its finding that it lacked removal jurisdiction") (emphasis added).

[26] In any event, § 1447(d) does not apply here for the independent reason that Congress did not intend for that provision to foreclose appellate review of erroneous decisions denying a foreign governmental entity's rights under the FSIA. *See* Pet. Br. 48-50; B.C. Br. 22-27; *see also* U.S. Br. 15 n.6. The Court need not reach that broader theory of appellate jurisdiction to resolve the applicability of § 1447(d) to this case because § 1447(d) is inapplicable under well-settled principles.

Respectfully submitted,

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April 6, 2007

ADDENDUM

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Statutory Provisions Involved:

28 U.S.C. § 1330.....Add. 1

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1330. **Actions against foreign states**

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

(13)

Nos. 05-85 and 05-584

In the Supreme Court of the United States

POWEREX CORP., PETITIONER

v.

RELIANT ENERGY SERVICES, INC., ET AL.

POWEREX CORP. DBA POWEREX ENERGY CORP., PETITIONER

v.

STATE OF CALIFORNIA, EX REL. BILL LOCKYER, ATTORNEY GENERAL OF CALIFORNIA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether petitioner, which is wholly owned by a crown corporation that is itself wholly owned by the Canadian Province of British Columbia, and which performs obligations and exercises rights of the Province pursuant to treaties with the United States, is entitled to the protections of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, as an "organ of a foreign state or political subdivision thereof," 28 U.S.C. 1603(b)(2).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, is "the sole basis for obtaining jurisdiction over a foreign state" in either state or federal court. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The FSIA defines the term "foreign state" to include "an agency or instrumentality of a foreign state," 28 U.S.C. 1603(a), which, in turn, is defined to mean:

> any entity—(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. 1603(b). The FSIA "guarantees foreign states the right to remove any civil action from a state court to a federal court." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 489 (1983) (citing 28 U.S.C. 1441(d)).

2. Petitioner is a corporation organized under the laws of the Province of British Columbia, a political subdivision of Canada. Petitioner is wholly owned by the British Columbia Power and Hydro Authority (BC Hydro), a provincial crown corporation that is in turn wholly owned by the Province of British Columbia. 05-85 Pet. App. 53a, 58a. As a crown corporation, BC Hydro is subject to the control and direction of

provincial officials, and BC Hydro pays its net revenue to the provincial government. *Id.* at 58a-59a.

Some of BC Hydro's responsibilities include implementing on behalf of Canada the Columbia River Treaty between the United States and Canada, which is designed to control the flow of the Columbia River for both flood control and power-generation purposes benefitting both nations. 05-85 Pet. App. 50a-51a.[1] Under the treaty-based management system, Canadian dams sometimes must release more water than would be optimal for their own power-generating purposes, in order to maintain water levels in the United States. *Id.* at 51a. In those circumstances, the treaty provides that the United States will reimburse BC Hydro (as assignee of Canada) for foregone power-generating opportunities. See *id.* at 51a, 55a.

BC Hydro generates more electric power than the Province needs. In 1988 BC Hydro created petitioner as a wholly owned subsidiary to market BC Hydro's excess power capacity to the United States, including the power to which Canada is entitled under the Columbia River Treaty. See 05-85 Pet. App. 53a, 55a. In addition, petitioner is responsible for providing power to the City of Seattle as required in the Skagit River Treaty between the United States and Canada.[2] See *id.* at 56a-57a. Petitioner's income is consolidated with that of BC Hydro and transferred either to the Province itself or to a special rate-stabilization account according to a formula specified by the Province. See *id.* at 202a-204a.

3. a. In No. 05-85, respondent plaintiffs—including the State of California and individual energy consumers—sued

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[1] See Treaty Between the United States of America and Canada Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, 15 U.S.T. 1555; 05-85 Pet. App. 61a-137a.

[2] See Treaty Between Canada and the United States of America Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D'Oreille River, Apr. 2, 1984, T.I.A.S. No. 11088; 05-85 Pet. App. 138a-146a.

respondent cross-plaintiffs (among others) in California state court, seeking damages for alleged manipulation of the electricity market in violation of state law. The respondent cross-plaintiffs filed cross-complaints against several entities including petitioner, BC Hydro, and two federal government agencies, the Bonneville Power Administration (BPA) and the Western Area Power Administration (WAPA). The cross-complaints seek indemnification and allege that petitioner and the other cross-defendants participated in or contributed to the manipulation of energy markets.

Petitioner and BC Hydro filed notices removing the case to federal district court pursuant to the FSIA, 28 U.S.C. 1441(d). The federal agencies invoked 28 U.S.C. 1442(a)(1) as additional authority for removal. 05-85 Pet. App. 19a. The respondent plaintiffs moved to remand the case to state court. They argued that the court lacked jurisdiction to adjudicate the claims against BC Hydro and the federal agencies because they were immune from suit on the cross-claims, and that petitioner was not entitled to the protections of the FSIA because it was not an agency or instrumentality of British Columbia. See *id.* at 20a, 22a, 33a, 38a.

The district court granted the motion to remand. The court held that, as "a corporation wholly-owned by a political subdivision of a foreign government," BC Hydro qualified as a "foreign state" for purposes of the FSIA, 05-85 Pet. App. 21a (citing 28 U.S.C. 1603(a)), and that the claims against it did not fall within any of the FSIA's exceptions to immunity, see *id.* at 21a-33a. The court also held that BPA and WAPA were immune from suit, *id.* at 40a, and that because the state court had lacked jurisdiction over the claims against BPA and WAPA, by derivation, so did the federal court, *id.* at 43a-44a.

The district court concluded that petitioner did not come within the statutory definition of an agency or instrumentality, and therefore did not qualify as a "foreign state" under

the FSIA. 05-85 Pet. App. 33a-38a. The district court held that petitioner is not an "organ" of British Columbia because petitioner does not exercise regulatory authority, is not immune from suit under Canadian law, and is not subject to active oversight by the provincial government. *Id.* at 35a. The court also observed that the provincial government does not appoint petitioner's corporate officers, and petitioner's employees are not treated as civil servants. *Ibid.* Nor, the court held, is petitioner an agency or instrumentality under the "ownership" test, because the Province does not directly own a majority of petitioner's shares. *Id.* at 36a-38a.

The district court remanded the action to state court. 05-85 Pet. App. 44a. B.C. Hydro and the federal agency cross-defendants sought to clarify that the claims against them had been dismissed on immunity grounds, but the district court denied their requests. The court reasoned that, because it could not exercise jurisdiction over the claims against the immune defendants, it could not dismiss those claims, and was instead required by 28 U.S.C. 1447(c) to remand the entire action (including the claims as to which there was immunity) to state court. See C.A. E.R. (PWX) 900, 904.

b. Petitioner, respondent cross-plaintiffs, BPA and WAPA each appealed. 05-85 Pet. App. 8a-9a. Respondent cross-plaintiffs challenged the holding that BC Hydro, BPA and WAPA were immune from suit; BPA and WAPA appealed the district court's failure to dismiss the claims against them before remanding; and petitioner challenged the denial of its status as an agency or instrumentality of the Province. *Ibid.*

The court of appeals' opinion first held that 28 U.S.C. 1447(d) did not preclude appellate review of the district court's order. The court reasoned that the district court had removal jurisdiction over the case at the outset because of BC Hydro's status as a foreign state and BPA and WAPA's status as federal agencies. 05-85 Pet. App. 10a. Because the district

court had jurisdiction, and had exercised that jurisdiction to decide the claims of immunity and the status of petitioner, the court of appeals held that it was "not deprived by § 1447(d) of jurisdiction to review these substantive rulings." *Ibid.*

The court then held (on the appeal of the respondent cross-plaintiffs) that BC Hydro, BPA, and WAPA were entitled to immunity. 05-85 Pet. App. 11a, 14a. It also held (on the appeal of the federal agencies) that the district court erred in refusing to dismiss the claims against the federal agencies because, in a removed action, a defendant's immunity "is vindicated only by the district court's dismissal of the claims." *Id.* at 16a.

With respect to petitioner's appeal, the court of appeals affirmed the district court's conclusion that petitioner does not qualify as an "organ of a foreign state or political subdivision thereof," 28 U.S.C. 1603(b)(2). 05-85 Pet. App. 14a. The court stated that its determination of organ status would turn ultimately on "whether the entity engages in a public activity on behalf of the foreign government," and that it would "look to the purposes of an entity's activities, the entity's independence from government, the level of financial support received from the government, and the entity's privileges and obligations under the law." *Id.* at 15a (quoting *Patrickson* v. *Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001), aff'd on other grounds, 538 U.S. 468 (2003)). The court of appeals stated that petitioner, like the entities in *Patrickson*, "was not run by government appointees, was not staffed with civil servants, was not wholly owned by the government, was not immune from suit, and did not exercise any regulatory authority." *Id.* at 15a-16a. The court acknowledged that petitioner offered evidence that it "serves a public purpose," but concluded that petitioner's "high degree of independence from the government of British Columbia, combined with its lack of financial support from the government and its lack of special privileges

or obligations under Canadian law dictate [the] holding that PowerEx is not an organ of British Columbia." *Id.* at 16a.

4. In No. 05-584, respondent (the California Attorney General) sued petitioner in state court, alleging that petitioner had manipulated the energy market in violation of state law. 05-584 Pet. App. 4a-5a. Petitioner removed the case to federal district court, on the grounds that it is a foreign state under the FSIA and that respondents' claims necessarily raised federal questions. *Id.* at 5a. The district court remanded. *Id.* at 4a-15a. With respect to petitioner's FSIA argument, the district court relied on the Ninth Circuit's earlier decision at issue in No. 05-85. *Id.* at 14a.

Petitioner appealed to the Ninth Circuit, which sua sponte dismissed the appeal for lack of jurisdiction, citing 28 U.S.C. 1447(d), and this Court's decision in *Things Remembered, Inc.* v. *Petrarco*, 516 U.S. 124, 128 (1995). 05-584 Pet. App. 1a.

DISCUSSION

The court of appeals' application of the FSIA's "organ of a foreign state" provision, 28 U.S.C. 1603(b)(2), is erroneous and conflicts with decisions of other courts of appeals. Moreover, the issue is an important, recurring, and sensitive one that warrants this Court's consideration. Although respondents assert several purported obstacles to the Court's reaching that issue, we believe that the petition in No. 05-85 presents an appropriate vehicle for this Court's review. Accordingly, the United States suggests that the Court grant review on the first question presented in No. 05-85, and hold the petition in No. 05-584 pending resolution of No. 05-85.

I. THE COURT OF APPEALS MISAPPLIED AN IMPORTANT PROVISION OF THE FSIA, AND ITS ANALYSIS CONFLICTS WITH THAT OF OTHER CIRCUITS

A. The FSIA establishes a "comprehensive scheme" governing the extent to which "foreign sovereigns may be held

liable in a court in the United States." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 496-497 (1983). In recognition of the fact that many states engage in commercial activities not unlike those of private actors, the FSIA codifies the "restrictive theory" of foreign sovereign immunity, according to which foreign states may be sued for their "commercial activities." *Id.* at 487-488. Although the FSIA denies immunity to foreign states in those circumstances, "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, the Act guarantees foreign states" certain procedural protections, such as the right to remove a civil action from state to federal court. *Id.* at 489. The FSIA also guarantees a foreign state the right to a bench, rather than jury, trial in federal court on claims as to which they are not immune, see 28 U.S.C. 1330(a), 1441(d).

Congress recognized that there are any number of ways in which foreign governments may organize their operations and functions, and it made certain that the FSIA would be flexible enough to accommodate that variety. Thus, Congress extended the protections of the FSIA to an "agency or instrumentality" of a foreign state, 28 U.S.C. 1603(a), and provided that entities could qualify as an "agency or instrumentality" in several ways, 28 U.S.C. 1603(b). The statutory definition establishes a categorical rule with respect to an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. 1603(b)(2). See *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 474 (2003) (construing that categorical protection to require direct ownership by the foreign state or political subdivision). In contrast to that categorical rule, the other prong of the definition—"an organ of a foreign state or political subdivision"—is intended to have a more functional application that is not dependent on a particular form of organization. See

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 15-16 (1976) (recognizing that an agency or instrumentality "could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name").

This Court has never addressed the meaning or application of this prong of FSIA's definition of an agency or instrumentality, yet that provision has taken on additional importance since the Court's decision in *Dole Food*. Whereas before the *Dole Food* decision, entities such as petitioner were often afforded protection under the FSIA's majority-ownership test, those entities must now rely exclusively on the immunity for organs of foreign states. See, *e.g.*, *USX Corp.* v. *Adriatic Ins. Co.*, 345 F.3d 190, 199 (3d Cir. 2003) (noting that the district court had initially upheld the defendant's foreign state status under the majority-ownership test, but, after *Dole Food*, had reevaluated the question under the "organ of a foreign state" prong), cert. denied, 541 U.S. 903 (2004); *id.* at 208 ("A flexible approach is particularly appropriate after *Dole*, inasmuch as courts likely now will be asked to evaluate the possible organ status of a wide variety of entities controlled by foreign states through tiering arrangements and because of the widely differing forms of ownership or control foreign states may exert over entities.").

B. At first glance, the courts of appeals may appear to have adopted similar approaches to determining whether an entity qualifies as an organ of a foreign state. Each considers multiple factors including, *inter alia*, the circumstance of the entity's creation, its purpose, the involvement of the state in its affairs, its employment practices, any financial support or grant of exclusive economic rights from the state, and its privileges and obligations under local law. See 05-85 Pet. App.

15a; *Filler* v. *Hanvitt Bank*, 378 F.3d 213, 217 (2d Cir.), cert. denied, 543 U.S. 1022 (2004); *USX*, 345 F.3d at 209; *Patrickson*, 251 F.3d at 807;[3] *Kelly* v. *Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-847 (5th Cir.), cert. denied, 531 U.S. 979 (2000).

A closer study, however, reveals a critical divergence in the manner in which the various circuits apply their seemingly similar tests. The Third and Fifth Circuits, for example, have emphasized "the need for a * * * flexible approach under the organ prong of section 1603(b)(2)," *USX*, 345 F.3d at 208, and that a court should "*not* apply [the factors] mechanically or require that all five support an organ-determination," *Kelly*, 213 F.3d at 847. Moreover, those courts understand the need to apply the factors with constant reference to the ultimate question: whether the defendant is "an entity that engages in activity serving a national interest and does so on behalf of its national government." *USX*, 345 F.3d at 209. The relevance and weight of any particular factor in a given case depends on the extent to which it informs that ultimate test. See *id.* at 214 ("[w]eighing the[] factors qualitiatively as well as quantitatively").

Although the Ninth Circuit also makes reference to "the ultimate question," 05-85 Pet. App. 15a, in practice it proceeds mechanically through a checklist. Its analysis, in full, of the factors as they apply to petitioner in No. 05-85 was as follows:

> [Petitioner] was not run by government appointees, was not staffed with civil servants, was not wholly owned by the government, was not immune from suit, and did not exercise any regulatory authority. *Even though [petitioner]*

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[3] In *Patrickson*, the Ninth Circuit held that the foreign entity there was neither an organ of nor majority-owned by a foreign state or political subdivision. This Court granted a petition for a writ of certiorari to consider only the question of majority ownership.

> *offers some evidence that it serves a public purpose*, its high degree of independence from the government of British Columbia, combined with its lack of financial support from the government and its lack of special privileges or obligations under Canadian law dictate our holding that [petitioner] is not an organ of British Columbia.

Id. at 15a-16a (emphasis added) (citation omitted). In other words, the court of appeals disregarded the substantial evidence that petitioner "serves a public purpose" because it did not conform with the result indicated by the court's mechanical application of other specified factors. The court did not analyze those factors to see what light they shed on whether petitioner was serving the interests of the Province.

The crucial differences between the courts of appeals' approaches can best be appreciated by comparing the analysis of the Ninth Circuit in No. 05-85 with that of the Third Circuit in *USX*. For example, the Ninth Circuit found it significant that petitioner "was not immune from suit" under Canadian law. 05-85 Pet. App. 16a. In contrast, the Third Circuit determined that whether the defendant "is subject to suit" in its home country "should not be considered [as] part of the organ analysis." *USX*, 345 F.3d at 214. It noted that, in order to be an organ, "an entity *must* be a separate legal person" and that "the right to sue and be sued [is] one factor to consider" in that analysis. *Id.* at 214 & n.24; *id.* at 209 n.17 (citing H.R. Rep. No. 1487, *supra*, at 15).[4] Similarly, whereas the Ninth Circuit counted the fact that petitioner engaged in commercial, rather than regulatory, activities against it, 05-85 Pet.

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[4] The Ninth Circuit's focus on petitioner's lack of immunity in Canada as a basis to deny petitioner all of the protections of the FSIA is particularly inappropriate when the entity engages in commercial activities that Congress likewise determined should not be protected by foreign sovereign immunity in the United States (even though an organ of a foreign state engaging in such activities would still enjoy the other protections of the FSIA).

App. 16a, the Third Circuit cautioned that "too heavy a focus on the commercial nature of an entity's activities would tend to confuse the question of the level of protection provided by the FSIA (full immunity or not) with the antecedent question * * * whether the entity comes within the purview of the FSIA at all," *USX*, 345 F.3d at 210.

The Ninth Circuit also determined as a factor against petitioner that it was "not wholly owned by the government," 05-85 Pet. App. 15a-16a, by which it meant that petitioner "is not owned by the Province, but by BC Hydro," *id.* at 16a. But that improperly weights the inquiry against treating an entity as an organ of a foreign state. That inquiry will generally be salient only for entities that do not satisfy the majority-ownership test. Such entities should not start the inquiry whether they satisfy Section 1603(b)(2)'s alternative standard with one strike against them. In contrast, the Third Circuit found that when a foreign government "has complete control over all shares of [the defendant] albeit through a tiered arrangement," by which the subsidiary serves the government's purposes, "this factor weighs in favor of a finding of organ status." *USX*, 345 F.3d at 213.

Similarly, whereas the Ninth Circuit emphasized that petitioner is "not staffed with civil servants," 05-85 Pet. App. 15a, the Third Circuit held that fact to be "of little relevance," and emphasized instead the fact that a government minister approved the entity's administrator, *USX*, 345 F.3d at 212-213. And, in contrast to the Ninth Circuit, which held that the Province's assignment to petitioner of the Province's entitlement to hydro-electric power under the Columbia River Treaty did not qualify as "financial support from the government," 05-85 Pet. App. 16a, the Third Circuit observed that the exploitation and distribution of natural resources is a "government purpose" that "would weigh * * * heavily in favor of organ status," *USX*, 345 F.3d at 210 (citing *Kelly*, 213 F.3d at 848, and

Corporacion Mexicana de Servicios Meritimos, S.A. de C.V. v. *M/T Respect*, 89 F.3d 650, 654-655 (9th Cir. 1996)).

C. A proper analysis of the question demonstrates that petitioner is an organ of the Province.[5] Under the proper approach, the court of appeals should have focused on the fact that petitioner was created for the purpose of marketing for export the Province's excess resource—electric power—including, in particular, marketing Canada's entitlement to power generated by BPA pursuant to the Columbia River Treaty and providing power to the City of Seattle as required of the Province in the Skagit River Treaty. See 05-85 Pet. App. 55a, 56a-57a. Rather than emphasizing that the Province does not provide direct financing to petitioner, it should have focused on the fact that petitioner plays an important role in discharging Canada's treaty obligations, that the Province assigned to petitioner its rights to Canada's entitlement under the Columbia River treaty, "a very significant resource," *id.* at 55a, and that petitioner's net income is returned to the Province via BC Hydro's consolidated income statements, see *id.* at 202a-204a. Instead of counting against petitioner the fact that its employees are not civil servants, the court should have emphasized that members of petitioner's board of directors are appointed by BC Hydro's board, which is appointed by the Provincial Lieutenant Governor, and that outside members of petitioner's board "were subject to concurrence by the Office of the Premier," *id.* at 58a-59a. Rather than declaring that petitioner is "not wholly owned by the government," *id.* at 15a-16a, it should have attached significance to the fact that the Province owns 100% of BC Hydro, which in turn owns 100% of petitioner. On a proper analysis, the court of appeals

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[5] The United States believes the courts below erred in failing to recognize petitioner's status as an organ of British Columbia that is entitled to the procedural protections of the FSIA, but takes no position on the merits of the claims at issue in these cases.

should have concluded that petitioner is an organ of the Province of British Columbia.[6]

II. THE QUESTION PRESENTED IS AN IMPORTANT ONE, AND NO. 05-85 IS AN APPROPRIATE VEHICLE IN WHICH TO RESOLVE IT

A. As noted above, a proper understanding of the "organ" prong is of considerable significance under the FSIA in light of *Dole Food*'s clarification of the majority-ownership test for agency or instrumentality status. See *USX*, 345 F.3d at 208 (quoted at p. 8, *supra*). A proper application of that prong is particularly important in this case. Canada is our Nation's largest trading partner, and Canada and its Provinces have numerous crown corporations that engage in trade with the United States. See 05-85 Pet. 24-25. Petitioner was created by BC Hydro—the Province's statutory agent for the promotion of hydroelectric development—specifically to market BC Hydro's surplus electric power outside the Province, including power the Province is entitled to receive or obligated to provide under treaties between the United States and Canada. Petitioner marketed power valued at approximately $11 billion Canadian between 2000 and 2004, see *ibid.*, and a large part of that power goes to States in the Ninth Circuit. Thus, if the court of appeals' decision is not overturned, it will bind petitioner in virtually all suits brought against it.

B. The respondent plaintiffs in No. 05-85 do not attempt to defend the merits of the court of appeals' classification of

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[6] As noted in the text, the fact that petitioner is 100% owned by a crown corporation that is, in turn, the statutory agent of and wholly owned by the Province is highly significant to petitioner's status as an organ of the Province. Petitioner also urges that the fact that BC Hydro owns Powerex as the Province's agent warrants a finding that petitioner satisfies the "ownership" prong, based on a case-by-case analysis. See 05-85 Pet. i, 29. The Court need not grant review on that question because petitioner qualifies as an "organ" under a correct application of the FSIA.

petitioner. Rather, they urge that the court of appeals' approach to the issue is not "new or different," 05-85 Br. in Opp. 6, and that, in any event, the Court cannot decide the issue because 28 U.S.C. 1447(d) precludes appellate review of the district court's remand order, 05-85 Opp. 4, and because plaintiffs' claims have been settled and dismissed, *id.* at 6. The first argument is incorrect, as we have demonstrated, see pp. 6-13, *supra*, and the other objections are not well founded.

1. In No. 05-85, the court of appeals held that it had "jurisdiction to review the district court's ruling on substantive issues of controlling law on the merits of the case." Pet. App. 6a. That conclusion was correct. The district court plainly had subject-matter jurisdiction at the time of removal, and its subsequent rulings did not divest it of that jurisdiction. Appellate review of the district court's remand order is therefore not barred by 28 U.S.C. 1447(d).[7]

This Court has made clear that Section 1447(d) must be read in *pari materia* with 28 U.S.C. 1447(c). See *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 343 (1976). "[O]nly remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." *Things Remembered,*

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[7] A similar issue relating to appeal from the denial of immunity under the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. 2679(d), is presented in *Osborn* v. *Haley*, No. 05-593 (argued October 30, 2006). Although the Court could hold this case pending resolution of *Osborn*, the better course would be to grant the petition in 05-85 outright and without waiting for a final decision in *Osborn*. If appellate jurisdiction is upheld in *Osborn*, that will only underscore that jurisdiction is appropriate here. On the other hand, if the Court finds appellate jurisdiction to be lacking in *Osborn*, it will be important to clarify that a similar result does not apply in the FSIA context, when the effect of such a rule would be to defeat Congress's judgment that questions regarding entitlement to the protections of the FSIA be decided in federal court if a foreign government entity elects a federal forum—at least where, as here, an entity that both courts below found *is* a foreign state (BC Hydro) also remains as a party to the case on remand.

Inc. v. *Petrarca*, 516 U.S. 124, 127 (1995). See *Kircher* v. *Putnam Funds Trust*, 126 S. Ct. 2145, 2153 (2006) (same). Thus, this Court has reviewed a remand order based on a district court's crowded docket, *Thermtron*, 423 U.S. at 340-341, a remand based on abstention, *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 710-712 (1996), and the discretionary remand of state law claims after the federal law claims that had supported removal were eliminated from the case, *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 348 (1988). Each of those cases was properly removed to federal district court, the district court therefore was properly vested with jurisdiction from the outset, and the purported ground for the remand was not one authorized by Section 1447(c).[8]

One ground for remand provided in Section 1447(c) is lack of subject matter jurisdiction. But that reference must be understood, and has been understood by the majority of the courts of appeals, as limited to remand orders for a lack of subject matter jurisdiction at the time of removal.[9] That

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[8] *Cohill* held that "Section[] * * * 1447(c) * * * do[es] not apply to cases over which a federal court has pendent jurisdiction," and that therefore "the remand authority conferred by the removal statute [Section 1447(c)] and the remand authority conferred by the doctrine of pendent jurisdiction overlap not at all." 484 U.S. at 355 n.11. It follows from *Cohill*'s holding that a discretionary remand of pendent claims is not a remand under Section 1447(c) and such a remand is not within Section 1447(d)'s bar to appellate review. See *Kircher*, 126 S. Ct. at 2153. But see *Things Remembered*, 516 U.S. at 130 (Kennedy, J., concurring) (stating that *Cohill* did not decide "whether subsection (d) would bar review" of orders remanding pendent claims as a matter of discretion).

[9] See, *e.g.*, *Letherer* v. *Alger Group, L.L.C.*, 328 F.3d 262, 265 (6th Cir. 2003) ("appellate review of remand orders is prohibited only where the district court remands because it lacks subject matter jurisdiction at the time of removal"); *Poore* v. *American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1290-1291 (11th Cir. 2000); *Transit Cas. Co.* v. *Certain Underwriters at Lloyd's*, 119 F.3d 619, 623 (8th Cir. 1997), cert. denied, 522 U.S. 1075 (1998); *Trans Penn Wax Corp.* v. *McCandless*, 50 F.3d 217, 223 (3d Cir. 1995); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708-709 (7th Cir. 1992). But see *Linton* v. *Airbus Industrie*,

reading is consistent with the general rule that a federal court's subject matter jurisdiction is fixed at the time the suit is brought and is not defeated by subsequent acts. See, *e.g.*, *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 541 U.S. 567, 574 (2004); *Freeport- McMoRan,Inc.* v. *KN Energy, Inc.*, 498 U.S. 426 (1991), cert. denied, 502 U.S. 1122 (1992); *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 294 (1938).

That reading is also consistent with the history of the removal statutes. Before 1988, the text of Section 1447(c) made explicit that it authorized remand based only on defects at the time of removal. It allowed remand "[i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction." 28 U.S.C. 1447(c) (1982). In 1988, Congress amended Section 1447(c) to distinguish between two types of defects in removal jurisdiction—a defect in removal procedure, and a defect in the district court's subject matter jurisdiction—and to provide that procedural defects are waived if not raised promptly. The amended provision specified that "a motion to remand the case on the basis of any defect in removal procedure must be made within 30 days" of removal, while it continued to require remand "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction." Pub. L. No. 100-702, § 1016(c)(1), 102 Stat. 4670. In 1996, the provision was again amended to clarify that waivable objections to removal include "any defect other than lack of subject matter jurisdiction." Pub. L. No. 104-219, § 1, 110 Stat. 3022.

As a number of courts of appeals have concluded, after reviewing the change in statutory text and the legislative history, "the proper inquiry is still whether the court had jurisdiction at the time of removal." *Poore*, 218 F.3d at 1290. See

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30 F.3d 592, 599-600 (5th Cir.) ("jurisdictional remands premised on post-removal events are not reviewable"), cert. denied, 513 U.S. 1044 (1994).

Van Meter v. *State Farm Fire & Cas. Co.*, 1 F.3d 445, 450 n.2 (6th Cir. 1993); *In re Shell Oil Co.*, 966 F.2d 1130, 1133 (7th Cir. 1992). Congress did not intend to depart from the well established rule "that jurisdiction present at the time a suit is filed or removed is unaffected by subsequent acts." *Id.* at 1133. Rather, Congress's focus in adopting the textual change was on ensuring that plaintiffs raise promptly any objection to removal on purely procedural grounds. See H.R. Rep. No. 889, 100th Cong., 2d Sess. Pt. 1, at 72 (1988). The statute's current structure bears that out. The reference in the first sentence of Section 1447(c) to "any defect other than lack of subject matter jurisdiction" makes clear that by the phrase "lack of subject matter jurisdiction" Congress means a particular, non-waivable, "defect" in removal.[10]

In this case, the district court stressed that no party contested that the actions could be removed pursuant to 28 U.S.C. 1441 and 1442. See 05-85 Pet. App. 20a. That recognition of the propriety of the court's removal jurisdiction at the outset is entirely correct and is, in itself, sufficient to take this case outside the scope of Section 1447(d). The district court itself recognized (and the court of appeals affirmed) that, as a crown corporation wholly owned by the Province of British Columbia, BC Hydro qualifies as an agency or instrumentality of Canada and therefore as a foreign state under 28 U.S.C. 1603(a) and (b). 05-85 Pet. App. 12a-14a, 21a. Therefore BC

[10] The legislative history of the 1988 change also reflects that Congress understood the mandatory (and unreviewable) remand for lack of subject matter jurisdiction at the time of removal that is referred to in Section 1447(c) to be distinct from a discretionary remand after the court had exercised its removal jurisdiction to resolve disputed federal questions. See H.R. Rep. No. 889, *supra*, at 72 (emphasizing that "[t]he amendment is written in terms of a defect in 'removal procedure' in order to avoid any implication that remand is unavailable after disposition of all federal questions leaves only State law questions that might be decided as a matter of ancillary or pendent jurisdiction or that instead might be remanded").

Hydro had the right to remove the action under 28 U.S.C. 1441(d) in order to have its claim of immunity decided by a federal, rather than state, forum. See *ibid.* ("Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court."). The district court did, in fact, exercise its removal jurisdiction to adjudicate BC Hydro's claim of immunity, which the court upheld. 05-85 Pet. App. 21a-33a. As federal agencies, BPA and WAPA were likewise entitled to remove the action pursuant to 28 U.S.C. 1442(a)(1) and have their immunity from suit adjudicated by the federal district court, which they did. See 05-85 Pet. App. 7a, 39a-40a; see *Kircher*, 126 S. Ct. at 2155 n.12 (noting that under Section 1442(a), the federal defendant need only raise a "colorable" defense of federal immunity in order to remove, because that section "reflects a congressional policy that 'federal officers, indeed the Federal Government itself, require the protection of a federal forum'") (quoting *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969)).[11]

Because (as the district court recognized, 05-85 Pet. App. 20a) removal by BC Hydro, BPA, and WAPA was proper, the

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[11] The logic of respondent plaintiffs' argument against appellate jurisdiction would appear to be that the court of appeals did not even have jurisdiction over the appeals by BPA and WAPA from the district court's refusal to dismiss them from the case rather than remanding the case back to state court with those federal agencies as parties, even though no party contested in district court that the cases were properly removed based on the presence of those agencies as defendants, see 05-85 Pet. App. 20a, and the district court correctly determined that both agencies were immune from suit. That result would deprive federal agencies of an important protection afforded by the removal statute (and sovereign immunity): the ability to remove the case from state court for the very purpose of securing dismissal from the case on immunity grounds at the outset. See S. Rep. No. 366, 104th Cong., 2d Sess. 30-31 (1996) (Section 1442(a)(1) reflects "Congress' intent that questions concerning * * * the scope of Federal immunity * * * be adjudicated in Federal court").

district court had subject-matter jurisdiction over the entire case irrespective of the sovereign status of petitioner. See, *e.g.*, *USX*, 345 F.3d 190; *Nolan* v. *Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), cert. denied, 499 U.S. 962 (1991); see also H.R. Rep. No. 1487, *supra*, at 32. The bar to appellate review in Section 1447(d) therefore does not apply to any remand order entered by the district court after it had resolved the immunity questions properly brought before it.[12]

Because the court of appeals correctly concluded that it had appellate jurisdiction over the appeal in No. 05-85, the Court should grant review in that case limited to the question of petitioner's status as an organ of a foreign state. In contrast, in No. 05-584, the court of appeals concluded that it lacked jurisdiction. 05-584 Pet. App. 1a. Although the court of appeals cited Section 1447(d) as the basis for dismissing the appeal, there is some dispute as to whether that holding was, in fact, based on the panel's understanding that the prior panel decision in No. 05-85 compelled the conclusion that the case had not been properly removed. See 05-584 Reply 3-4. Because the court of appeals' one page order does not lend itself to a full consideration of the issue by this Court, we sug-

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[12] Although the district court invoked Section 1447(c) as the basis for its remand, that court's characterization of its action is not binding on this Court as to the scope of its appellate jurisdiction. See, *e.g.*, *United States* v. *Jorn*, 400 U.S. 470, 478 n.7 (1971) (plurality opinion of Harlan, J.) ("the trial judge's characterization of his own action cannot control the classification of the action for purposes of our appellate jurisdiction"); *United States* v. *Sisson*, 399 U.S. 267, 279 n.7 (1970). The reviewing court must determine its own jurisdiction independently. See *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 740, 742 (1976) (court of appeals erred in accepting the district court's "recital" that final judgment had been entered when the record showed the contrary); *Things Remembered*, 516 U.S. at 134 (Ginsburg, J., concurring).

gest that the Court hold the petition in No. 05-584 and dispose of it consistent with the disposition of No. 05-85.[13]

Finally, the settlement agreement reached between the plaintiff and respondent cross-plaintiffs in No. 05-85 does not moot the petition. Although the respondent cross-plaintiffs have apparently offered to dismiss the cross-claims, any such dismissal would be without prejudice to reinstating them if the underlying settlement with the plaintiffs is overturned. See 05-85 Reply 2-3. Petitioner has not agreed to settle on those terms. *Ibid.* Moreover, it is our understanding that certain parties object to the settlement and have recently filed appeals concerning their objections in the state courts. See Wholesale Electricity Antitrust Cases I & II, J.C.C.P. No. 4204 (Cal. Super. Ct. San Diego County), State of Montana's Notice of Appeal (July 28, 2006). Thus, the petition is not now moot, and this Court would almost certainly resolve the case before the settlement between the plaintiff and respondent cross-plaintiffs becomes final.

CONCLUSION

The petition for a writ of certiorari in No. 05-85 should be granted limited to the first question presented. The petition for a writ of certiorari in No. 05-584 should be held pending resolution of No. 05-85 and then disposed of as appropriate in light of the disposition of that case.

Respectfully submitted.

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[13] A typical remand order merely determines which of two acceptable fora will adjudicate the plaintiff's claim, and Congress has determined that interests of efficiency warrant barring appellate review of that decision. See *Kircher*, 126 S. Ct. at 2156. In contrast, Congress has specifically determined that proper treatment of foreign states and their agencies and instrumentalities demands that they be afforded a federal forum, in which they would be subject to trial only by a judge. Congress should not lightly be taken to have intended for those benefits to be irretrievably lost by a district court's erroneous ruling.

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No. 05-85

IN THE

Supreme Court of the United States

POWEREX CORP.,

Petitioner,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE GOVERNMENT OF CANADA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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August 17, 2005

* Admitted in New York; admission pending in the District of Columbia

MOTION OF THE GOVERNMENT OF CANADA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Government of Canada ("Canada") moves, pursuant to Supreme Court Rule 37, for leave to file the annexed Brief as *amicus curiae* in support of the petition for a writ of certiorari of Powerex Corporation. Petitioner has consented. Undersigned counsel have made efforts to obtain consent from respondents, and have received written consent, copies of which are annexed, from counsel for the following respondents:

AES Alamitos LLC
AES Corporation
AES Huntington Beach LLC
AES Redondo Beach LLC
Arizona Electric Power Cooperative, Inc.
Avista Energy, Inc.
Duke Energy[1]
IDACORP Energy, L.P.
Idaho Power Company
MIECO, Inc.
Northern California Power Agency
Portland General Electric Company
PPL Montana, L.L.C.
Puget Sound Energy, Inc.
Reliant Energy Inc., and its affiliates
Sacramento Municipal Utility District
Sierra Pacific Industries
Silicon Valley Power (City of Santa Clara)
TransAlta Energy Marketing Company
Tucson Electric Power Company.

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[1] Counsel for Duke Energy Trading and Marketing, LLC and its affiliates indicated via e-mail that "Duke energy consents."

Canada is filing this Motion because it has not received responses from the remaining respondents as of the time of the printing of the Brief.

The issue presented by the petition -- whether, when Powerex Corporation is acting on behalf of the Government of British Columbia, it is, and is entitled to be treated as, part of British Columbia, and therefore to be accorded sovereign status under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611 -- is a matter of significant concern to the Government of Canada and its citizens. Because Canada believes its views would materially assist the Court in its consideration of the petition for a writ of certiorari, Canada respectfully requests leave to file the attached Brief.

Dated: Washington, D.C.
August 17, 2005

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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This Brief *amicus curiae,*[1] submitted in support of petitioner's request for a writ of *certiorari*, is accompanied by a Motion for Leave to File Brief as *Amicus Curiae* in Support of Petitioner.

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[1] No counsel for a party authored this Brief in whole or in part. No person other than the *amicus curiae* made a monetary contribution to the preparation or submission of this Brief.

THE INTEREST OF *AMICUS CURIAE* THE GOVERNMENT OF CANADA

The Government of Canada, as sovereign, has a vital interest in the issue addressed in this Brief *amicus curiae*: whether, when Powerex Corporation ("Powerex") is acting on behalf of the Government of British Columbia, it is, and is entitled to be treated as, part of British Columbia, and therefore to be accorded sovereign status under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611 (the "FSIA"). Although Powerex concedes it is not immune from suit, the FSIA "guarantee[s] a foreign state defending an unbarred claim certain protections," including the right to have claims against it tried to a United States District Judge, without a jury. *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 484 (2003) (Breyer, J., concurring in part and dissenting in part); *see* 28 U.S.C. § 1603(b)(2).

In deciding to exercise their powers through political subdivisions or controlled corporations, Canada or its political subdivisions consider whether immunity and other sovereign prerogatives are available, under principles of international law, to the entity through which they act. Because sovereigns may choose to act through a variety of entities in more than one jurisdiction, predictability in the application of the rules governing sovereign status is of special importance. By departing from the rules applied by other United States Courts of Appeals, the Ninth Circuit's decision creates uncertainty as to whether the actions of Canada or its political subdivisions may be subjected to scrutiny by state court juries.

Canada has an especially strong interest in the practical consequences of this Court's decision because, given the interdependence of the economies of Canada and the United States -- which enjoy the largest bilateral trading

relationship in the world -- the definition of "sovereign" applied in United States courts is likely to have significant effects on the conduct of business across the Canadian-United States border.

The heightened unpredictability as to sovereign status flowing from the Ninth Circuit decision seriously threatens to impair that relationship. Canada's strong interest in predictability of the application of rules determining sovereign status, and honoring the benefits due sovereigns, leads it to support the petitioner's request that this Court review and reverse the decision below.

SUMMARY OF ARGUMENT

The Ninth Circuit found -- and Canada agrees -- that British Columbia is itself a "political subdivision" or "constituent unit" of Canada, thereby coming under the definition of "state" or "sovereign" under the FSIA. *California* v. *NRG Energy, Inc.*, 391 F.3d 1011, 1024-25 (9th Cir. 2004). Powerex is wholly owned by British Columbia Hydro and Power Authority ("BC Hydro"), which is itself treated as a foreign sovereign. The Ninth Circuit concedes BC Hydro to have been, in all respects relevant to this lawsuit, performing "sovereign functions." *Id.* at 1025. Under recognized principles of international law, Powerex is equally entitled to be treated as a sovereign when it is acting on behalf of BC Hydro or of the Government of British Columbia. Those principles also require that great weight be given to the views of British Columbia regarding Powerex's sovereign status.

Determination of sovereign status is governed by rules of customary international law regarding the sovereign equality of States and non-interference by one State in the internal affairs of another. *See, e.g.*, Ian Brownlie,

Principles of Public International Law 287-88 (6th ed. 2003); *Oppenheim's International Law*, 81-82 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992). Both of these tenets are fundamental to the international legal system. Thus courts charged with determining the content of the applicable rules must look to the practice of States on questions of immunity and sovereign status. These are found both in national law -- legislation and decisions of national courts -- and in the principles recently codified in the United Nations Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. G.A., 59th Sess., U.N. Doc. A/RES/59/38 (Dec. 16, 2004).

Principles of comity recognized by both Canadian and United States courts require courts to interpret their national legislation in a manner consistent with international law and the practice of States in all cases in which it is possible to harmonize the two, as it is here. Complying with international law principles serves the interests of predictability, enabling a sovereign to determine the best way to structure its activities and to exercise its powers. Honoring comity also ensures that the views of the sovereign that creates an entity -- as British Columbia did with respect to BC Hydro and Powerex -- are accorded special weight in deciding whether an entity like Powerex is an organ, agency, or instrumentality of British Columbia.

Rules of international comity promote the cooperation and accommodation essential to the orderly and harmonious regulation of international commerce. Adherence to these principles is essential to the functioning of the closely related economies of Canada and the United States. Disregard of these fundamental principles, where the responsible government has chosen to act itself through State entities, will only complicate and impede commercial relations between the two countries. Disregard of

international law also intrudes upon, and derogates, the sovereign prerogatives, rights, and interests of the Government of Canada and its Provinces and other political subdivisions to decide the manner in which Governmental activities will be conducted.

ARGUMENT
I.

THIS COURT SHOULD REVIEW THE DECISION BELOW BECAUSE, BY DEPARTING FROM DECISIONS OF OTHER COURTS OF APPEALS, THE NINTH CIRCUIT'S DECISION CREATES UNCERTAINTY AS TO WHETHER STATE-CREATED ENTITIES WILL BE TREATED AS SOVEREIGNS.

The decision below departs from those of other Courts of Appeals, specifically the Second, Third, and Fifth Circuits, regarding the types of entities that are entitled to sovereign treatment under the FSIA. *See USX Corp.* v. *Adriatic Ins. Co.*, 345 F.3d 190, 209 (3d Cir. 2003) ("an entity that engages in activity serving a national interest and does so on behalf of its national government qualifies for the protections of the FSIA, including a federal forum"), *cert. denied*, 541 U.S. 903 (2004). *See also Filler* v. *Hanvit Bank*, 378 F.3d 213, 217 (2d Cir.) (in determining whether an entity is entitled to sovereign treatment under the FSIA, courts should consider various factors, including (1) whether the entity was created for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the entity is required to hire public employees and whether the foreign state pays the employees' salaries; (4) whether the entity holds any exclusive rights in the foreign country; and

(5) how the entity is treated under foreign state law), *cert. denied*, 125 S. Ct. 677 (2004); *Kelly* v. *Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-48 (5th Cir. 2000) (considering the same five factors as the Second Circuit and noting "we will *not* apply them mechanically or require that all five support an organ-determination").

This divergence of views creates considerable uncertainty for Canada, its Provinces, and other political subdivisions, in determining both how to structure the entities through which they conduct their affairs and how to allocate responsibilities among state-created entities that carry out sovereign functions. In order to properly exercise their powers, foreign sovereigns need predictability with respect to the way United States courts interpret the FSIA's applicability to entities created by sovereigns and conducting activities on their behalf, such as Powerex.

II.

UNITED STATES COURTS SHOULD INTERPRET THE FSIA IN A MANNER CONSISTENT WITH PRINCIPLES OF COMITY AS APPLIED IN CUSTOMARY INTERNATIONAL LAW AND THE PRACTICE OF STATES.

Principles of international law and comity properly apply when United States courts consider how they should interpret the term "sovereign" under the FSIA. The importance of comity is heightened in this particular case, where the political subdivision that created Powerex and determined what functions it should perform has a view very different from that of the Ninth Circuit as to whether Powerex is entitled to the procedural protections accorded to sovereigns. This Court should not affirm the ruling below, which disregards the views of the sovereign that creates an

entity and the standards for determining sovereign status applied by the State under whose laws the entity was formed. A decision by this Court affirming the Ninth Circuit would adversely affect the ability of foreign sovereigns, such as Canada and its political subdivisions, to decide how to structure the entities through which they conduct their affairs. Acceding to principles of comity of nations would, in contrast, lead to an interpretation of the FSIA that is consistent with that of other States and with international law, thus providing needed predictability to States in structuring and carrying out their sovereign functions.

This Court, like Canadian courts, has long held that international law considerations form an essential element of statutory construction. Over two hundred years ago, Chief Justice Marshall articulated what has become a fundamental canon of statutory construction, namely, that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

This Court has repeatedly reaffirmed the vitality of Chief Justice Marshall's rule, firmly establishing principles of comity as part of the jurisprudence of the United States. Thus, the opinion in *F. Hoffman-LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004), followed the rule that "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Id.* at 236.

The Courts of Appeals have similarly recognized the fundamental role of comity in United States jurisprudence. In *United States* v. *Aluminum Co. of Am.*, 148 F. 2d 416 (2d Cir. 1945), for example, Judge Learned Hand cautioned that "we are not to read general words, such as those in [the Sherman Act] without regard to the limitations customarily

observed by nations upon the exercise of their powers . . . ." *Id.* at 443. *See also Restatement (Third) of Foreign Relations Law of the United States* § 403 (1987), the commentary to which confirms the "rule of construction" that statutes must be interpreted whenever possible to avoid unreasonableness or "conflict with the law of another state." *Id.*, cmt. g.

Principles of comity are also firmly established in Canadian jurisprudence. The Supreme Court of Canada has defined comity in terms that echo decisions of this Court. In *De Savoye* v. *Morguard Invs. Ltd.*, 3 S.C.R. 1077, 1096 (Can. 1990), the Supreme Court recognized that "'comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Id.* Rather, because it is founded on "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws," comity cannot legally be disregarded. *Id.* (*citing Hilton* v. *Guyot*, 159 U.S. 113, 163-64 (1895)).

In this case, no reason appears for either the Ninth Circuit or this Court, in interpreting the FSIA, to decline to follow international law, which counsels that United States courts should give considerable weight to the views of the Government of British Columbia -- the entity that created Powerex -- as to whether Powerex is entitled to be accorded the procedural safeguards due a sovereign under the FSIA. 28 U.S.C. § 1603.

III.

THE DECISION BELOW CONFLICTS WITH PRINCIPLES OF INTERNATIONAL LAW UNDER WHICH ENTITIES EXERCISING SOVEREIGN FUNCTIONS SHOULD BE TREATED AS SOVEREIGNS.

The newly adopted United Nations Convention on the Jurisdictional Immunities of States and Their Property has codified the customary international law of State immunity. Article 2(1)(b)(iii) of that Convention includes in the definition of a "State" "agencies or instrumentalities of the State or other entities, *to the extent that they are entitled to perform and are actually performing* acts in the exercise of sovereign authority of the State." G.A. Res. 59/38, *supra* (emphasis added). The Convention thus confirms the importance under international law of an entity's *function* in analyzing whether it qualifies for sovereign treatment.

Although the Ninth Circuit correctly held that the Province of British Columbia, a political subdivision of Canada, is entitled to sovereign treatment under the FSIA, *see NRG Energy, Inc.*, 391 F. 3d at 1024-25, it did not consider the "function" test applied by courts around the world to determine whether agents and sub-agents of political subdivisions should also be accorded sovereign status. *Cf.* Canadian State Immunity Act, R.S.C., ch. S-18, § 2 (1985). Yet, under international law, the function test should be considered in deciding whether an "agent" or an "organ" is to be treated as a sovereign. *See, e.g.*, Brownlie, *supra* at 336-37.

In many countries, including Canada and the United States, separate juridical status creates a presumption against

immunity. However, that presumption is overcome when the entity is exercising sovereign functions. This approach can be found in the legislation of the United Kingdom, South Africa, and others. *See* State Immunity Ordinance, No. VI of 1981, § 15(2) (Pakistan); State Immunity Act, Cap 313, § 16(2), *available in* Materials on Jurisdictional Immunities of States and Their Property (United Nations Legislative Series), U.N. Doc. ST/LEG/SER.B/20 32 (1982) (Singapore); Foreign States Immunities Act 87 of 1981, § 15(1) (South Africa); State Immunity Act, 1978, § 14(2) (U.K.), *reprinted in* 17 I.L.M. 1123 (1978). In countries such as Australia, legislation provides as well that agencies and instrumentalities of foreign States are immune in relation to acts of sovereign authority if the immunity had been available to the State itself in the circumstances. Foreign States Immunities Act, 1985, No. 196 of 1985, *amended by* Statute Law (Miscellaneous Provisions) Act, 1987, No. 141 of 1987. Thus the function test enjoys widespread acceptance by States and forms a relevant ground of decision that was ignored by the Ninth Circuit.

Under the function test, as under the principles of comity of nations addressed above, the views of the Province of British Columbia are of special relevance. Given British Columbia's position that Powerex was created to fulfill a sovereign function, and that it was doing so at all times relevant to this action, this Court should, consistent with international law and practice, accord to Powerex the procedural benefits it seeks under the FSIA.

CONCLUSION

This Court should follow principles of international law and the practice of States regarding comity of nations, including the importance of the "function test" to determine

whether Powerex is to be treated as a sovereign. Under these principles, it was unreasonable for the Ninth Circuit to construe the FSIA to exclude from the definition of "sovereign" a corporation wholly owned by an agent of British Columbia, which British Columbia considers to have been carrying out a sovereign function. Furthermore, because the Ninth Circuit's holding creates non-uniformity in the rules the United States Courts of Appeals apply to determine sovereign status under the FSIA, Canada urges this Court to grant the petition for *certiorari*, and to reverse the judgment of the court below.

Dated: Washington, D.C.
August 17, 2005

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No. 05-85

IN THE
Supreme Court of the United States

POWEREX CORP.,
Petitioner,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Statement pursuant to Rule 29.6 was set forth at page vii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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REPLY BRIEF FOR PETITIONER

Respondents (plaintiffs below) do not dispute two key facts: (1) the Ninth Circuit's approach to resolving claims under the FSIA conflicts with that of three other circuits; and (2) the issues involved in this case are critically important for foreign governments conducting business in the United States. Indeed, the governments of Canada and British Columbia have taken the unusual step of filing *amicus* briefs at the certiorari stage to support plenary review. Plaintiffs do not dispute that the Questions Presented warrant certiorari.

Instead, they merely protest that this case is not the proper vehicle for resolving them. Plaintiffs' principal contention is that this Court should deny review because the case is about to be mooted by settlements between the plaintiffs and the defendants (two of whom filed the cross-claims that brought Powerex into this case). Although one of those settlements remains subject to certain contingencies, if the Court agrees with plaintiffs about mootness, the appropriate disposition is not to deny the petition but to vacate the decisions below under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), which held that the mooting of a case should not deprive a party of its rights to obtain appellate review. Under *Munsingwear*, Powerex is entitled to vacatur of the decisions below because Powerex did not contribute in any way (as plaintiffs themselves note) to the case becoming moot.

If the Court does not perceive that this case is in fact moot at this time, an alternative disposition would be to hold this petition for *Powerex Corp. v. California ex rel. Lockyer*, No. 05-584 (U.S. filed Nov. 4, 2005), in which the exact same issues are presented and the State of California has waived response. The Court should call for a response in No. 05-584, as it did here, and hold this petition pending disposition of that case and the conclusion of the settlement process. That treatment would ensure that Powerex is not prejudiced by the parties' settlement in No. 05-85 and deprived of appellate review of its status as

a foreign sovereign, an issue the Ninth Circuit in No. 05-584 treated as settled law by dismissing Powerex's appeal.

I. THIS COURT HAS JURISDICTION TO DECIDE THE ISSUES PRESENTED BY THE PETITION

Plaintiffs assert the existence of three jurisdictional obstacles to review by this Court. None provides a basis for denying the petition. First, a live controversy in this case remains because one of the settlements has not yet taken effect, and events that might moot the case in the future are subject to contingencies. Second, this Court can remedy the district court's erroneous remand order, as it has done in prior cases. Third, the court of appeals correctly determined that it had appellate jurisdiction over this case.

A. The Settlement Agreements Have Not Mooted This Case

This petition arises out of consolidated actions originally filed in California state court by a class of plaintiffs (respondents here) against a number of defendants (also respondents here), including Reliant Energy Services, Inc. ("Reliant") and Duke Energy Trading and Marketing, LLC ("Duke"). Reliant and Duke brought cross-claims against Powerex and others. Plaintiffs' claims against Reliant and Duke have been compromised as part of global settlement agreements entered into by the two companies to resolve all of their potential liabilities arising out of their conduct during the California energy crisis. The Reliant settlement is under review by the state trial court and the Federal Energy Regulatory Commission ("FERC"), and plaintiffs' claims against Reliant remain pending in state court.[1] Reliant and the other cross-defendants, however, have agreed to the dismissal of

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[1] The Duke settlement has been approved by the state trial court and FERC. *See* Order on Settlement Agreement, *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs. into Markets Operated by the Cal. Indep. Sys. Operator & the Cal. Power Exch.*, 109 FERC ¶ 61,257 (2004).

Reliant's cross-complaint, subject to a significant qualification – that the cross-complaint will be reinstated if Reliant's global settlement is rejected by FERC or the state courts. Powerex has not joined the other cross-defendants in agreeing to the dismissal of the cross-complaint, and the cross-claims against Powerex have not been dismissed.

Although conceding (Opp. 3) that cross-claims against Powerex remain pending, plaintiffs nonetheless assert that this case is moot because all parties except Powerex are willing to have the cross-claims dismissed. But that contention ignores the significant contingencies to which the proposed dismissal would be subject – state court and FERC approval and affirmance on appeal if any objector appears. Neither the state courts nor FERC has approved the Reliant settlement.

Thus, all parties retain "a continuing interest" in this litigation. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 192 (2000). Reliant retains the right to pursue its pending cross-claims against Powerex if the global settlements are invalidated and plaintiffs pursue their claims against Duke and Reliant. Plaintiffs therefore overstate the situation in asserting that the case is now moot.

If the global settlements are approved and this petition formally becomes moot, Powerex, through no conduct of its own, will have lost the opportunity to seek this Court's review of the court of appeals' judgment denying its right to remove the case as a foreign sovereign under the FSIA. Consequently, the proper disposition would be to grant this petition, vacate that part of the court of appeals' judgment that is the subject of Powerex's appeal to this Court – the Ninth Circuit's decision that Powerex is not a foreign sovereign – and remand with instructions to vacate the lower courts' rulings that Powerex is not a foreign sovereign. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-75, 80 (1997); *Munsingwear*, 340 U.S. at

39.[2] Because Powerex has not participated in the settlements or the proposals to dismiss the cross-complaints, there is no basis for permitting the lower courts' judgments to stand under the rule that those who voluntarily forfeit review through settlement are not entitled to vacatur. *See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994).

Significantly, the Ninth Circuit panel that denied Powerex's FSIA claim in this case lacked the benefit of the *amicus curiae* briefs that Canada and the Province of British Columbia have filed urging this Court to grant certiorari and to reverse the Ninth Circuit. Issuing a *Munsingwear* order in this case is crucial to provide the Ninth Circuit an opportunity to re-evaluate Powerex's FSIA claims in light of those foreign sovereigns' attestations to Powerex's sovereign status. If this Court instead allows the court of appeals' decision in this case to stand by denying certiorari in this case and in No. 05-584, Powerex will never have another opportunity to assert its FSIA rights in the United States judicial circuit in which it does the bulk of its business.[3]

The Ninth Circuit made that clear when it summarily dismissed an appeal by Powerex on the evident authority of its decision in this case. Powerex has sought this Court's review of that decision as well, and its petition in No. 05-584 raises the same two important questions that are presented here.[4] As things stand, plenary review by

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[2] In other cases, this Court has issued such partial vacaturs for mootness. *See, e.g., Deakins v. Monaghan*, 484 U.S. 193, 195 (1988). That disposition is appropriate given that no other party is challenging any other aspect of the Ninth Circuit's decision, such as its correct holding that BC Hydro is a foreign sovereign.

[3] In addition, there is also the possibility that a plaintiff could claim that issue preclusion prevents Powerex from re-litigating in a different circuit the question whether it is a foreign sovereign under the FSIA.

[4] If the Court determines that this case is moot and properly issues a *Munsingwear* order, it should also vacate the Ninth Circuit's judgment in No. 05-584 – which depends on that court's decision in this

this Court is Powerex's only remaining avenue for obtaining appellate consideration of its FSIA claims unless the Court issues a *Munsingwear* order. Denial of that review would force Powerex to defend itself against multiple suits in state court, stripped of the jurisdictional and procedural protections guaranteed it by Congress in the FSIA.

B. The District Court's Entry Of An Order Of Remand Did Not Moot This Case

Plaintiffs advance the remarkable position that the district court's order remanding this case to state court stripped this Court of the power to review the court of appeals' judgment. The Court's cases refute that contention. In *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996), this Court held that a district court erred in remanding a case, and it affirmed the court of appeals' judgment vacating the remand order and directing that the case be sent to arbitration. *See id.* at 710, 731. In doing so, this Court gave no indication that the court of appeals had lacked the power to vacate the district court's order of remand, even though that order had not been stayed. *See id.* at 710. Similarly, in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), this Court reversed the court of appeals' affirmance of a remand order, holding that the district court had exceeded its authority in remanding. *See id.* at 345, 353. Again, the opinion contained no indication that this Court lacked jurisdiction to undo the remand order, and nothing in the opinion suggested that the remand order had been stayed.

Plaintiffs contend, however, that this Court's decision in *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934), stands for the proposition that a remand order, once effectuated, cannot be undone. But *City of Waco* held no such thing. There, the remand order had not been appealed. *See id.* at 142. Thus, in observing

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case – and remand that case for further consideration, thereby providing the Ninth Circuit a chance to consider Powerex's FSIA claim in light of the *amicus* briefs of Canada and British Columbia.

that "[a] reversal cannot affect the order of remand," *id.* at 143, the Court was simply acknowledging that an appellate court lacks the power to reverse or vacate an order that has not been appealed. Nothing in *City of Waco* suggests that a remand order is *always* functionally unreviewable because it cannot be undone if a reviewing court concludes that it was erroneous.

C. The Court Of Appeals Had Jurisdiction Over Powerex's Appeal

Plaintiffs also incorrectly assert (Opp. 4) that this Court cannot review the FSIA rulings in this case because they accompanied an order of remand. The Ninth Circuit correctly concluded (Pet. App. 9a-10a) that 28 U.S.C. § 1447(d) does not prevent appellate review of a district court's resolution of a removing party's claim to foreign-state status under the FSIA. Under this Court's decision in *City of Waco*, legal determinations that "precede[]" an order of remand "in logic and in fact" and that are "conclusive" can be reviewed on appeal. 293 U.S. at 143. A conclusion that a foreign entity is not an "instrumentality of a foreign state" under the FSIA fits those criteria for two reasons. First, the rejection of an FSIA claim has "independent relevance in adjudging the rights of the parties," *Powers v. Southland Corp.*, 4 F.3d 223, 227-28 (3d Cir. 1993) – and therefore "precede[s]" the decision to remand – because the FSIA confers "particularized procedural" rights on foreign sovereigns beyond jurisdiction, including extended time to answer a complaint, protections against default, limitations on remedies, special venue rules, and the right to a non-jury trial before a federal judge. *See USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 207 (3d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004); 28 U.S.C. §§ 1391(f), 1441(d), 1608(d)-(e), 1609. Second, denial of foreign-state status under the FSIA is "functionally unreviewable in state court[]," *Stevens v. Brink's Home Sec., Inc.*, 378 F.3d 944, 946 (9th Cir. 2004) (internal quotation marks omitted) – and thus "conclusive" – because the state court on remand is not empowered to

afford a foreign entity any of the procedural and jurisdictional protections to which it is entitled under the FSIA. Thus, the rejection of an FSIA claim is a conclusive legal ruling preceding the decision to remand that can be reviewed on appeal consistent with § 1447(d).

More importantly for the Court's consideration of this petition, the existence of that issue of appellate jurisdiction does not provide a reason for denying certiorari. If anything, it provides an additional reason to grant this petition, because the question independently merits this Court's review. As plaintiffs note (Opp. 4), the courts of appeals are in conflict regarding the appealability of remand orders rejecting removal under the FSIA. *Compare* Pet. App. 9a-10a *with Linton v. Airbus Indus.*, 30 F.3d 592 (5th Cir. 1994). The issue is an important one: the way in which federal courts treat FSIA claims has a significant impact on this country's foreign trade and international relations. The lack of a uniform national rule permitting foreign entities that are denied the right to remove under the FSIA to obtain appellate review threatens international comity. A single federal district judge should not have unreviewable discretion to deny a foreign entity its right to a bench trial in federal court and to subject that entity to a jury trial in state court, particularly where a plaintiff in a subsequent suit against that entity might contend that that judge's ruling should be given issue-preclusive effect. In addition, this case and No. 05-584 provide the Court an excellent opportunity to clarify the appealability of remand orders generally; this Court recently recognized the importance of providing that clarity by inviting the Solicitor General to file a brief expressing the views of the United States in a case raising a question regarding the appealability of remand orders. *See* Order, *Davis v. International Union, UAW*, No. 05-107 (U.S. Dec. 5, 2005).

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE MULTI-CIRCUIT CONFLICT ON THE PROPER TEST FOR DETERMINING WHETHER AN ENTITY IS AN "ORGAN" OF A FOREIGN STATE UNDER THE FSIA

Plaintiffs refuse to acknowledge (Opp. 6-8) that the Ninth Circuit has developed a new, categorical approach to resolving FSIA claims that departs from Congress's desire for a fact-sensitive review of each case. They assert that the court of appeals here considered *sub silentio* both the circumstances surrounding the creation of Powerex and the employment policies and responsibilities of Powerex because the court cited a page from its prior decision in *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), *aff'd in part*, 538 U.S. 468 (2003). But plaintiffs ignore the sentence immediately preceding the court of appeals' citation of *Dole Food*. In that sentence, the Ninth Circuit articulated the test that it would apply to Powerex's FSIA claim, omitting any mention of circumstances of creation and employment practices: "[W]e look to the purposes of an entity's activities, the entity's independence from government, the level of financial support received from the government, and the entity's privileges and obligations under the law." Pet. App. 15a (citing *Dole Food*, 251 F.3d at 807). The Ninth Circuit's citation to its prior decision in *Dole Food* does not change the fact that it failed completely to consider Powerex's genesis as a wholly owned subsidiary of a Canadian Crown Corporation that is the Province's agent by statute, Powerex's adherence to Provincial guidelines for its operations (including employment policies), and the Province's guarantees of pension benefits for Powerex's employees. *See id.* at 14a-16a.[5]

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[5] Although the Ninth Circuit in *Dole Food* recited the factors that the panel below failed to consider here, the *Dole Food* panel ultimately truncated the proper inquiry by refusing to acknowledge the significance of Israel's creation of the entities at issue there for the public purpose of exploiting governmental resources. *See* 251 F.3d at 808.

In any event, plaintiffs have not disputed the reality that the categorical standard applied by the panel in this case conflicts with the totality-of-the-circumstances approach that prevails in the Second, Third, and Fifth Circuits. *See Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir.), *cert. denied*, 125 S. Ct. 677 (2004); *USX*, 345 F.3d at 206, 209; *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-47 (5th Cir. 2000). Nor do they contest the fact that the current lack of uniformity in interpretation of the FSIA affects an immense amount of commerce flowing through states composing the Ninth Circuit. *See* Pet. 24-25. This Court's review is needed to assure foreign entities engaged in business in this country that they will not be denied their jurisdictional and procedural rights under the FSIA by courts that fail to take into account all of the factors that bear on their sovereign status.

III. THE NINTH CIRCUIT MISUNDERSTOOD THIS COURT'S DECISION IN *DOLE FOOD*

Plaintiffs err in contending (Opp. 8-9) that Powerex is not an "instrumentality of a foreign state" "a majority of whose shares . . . is owned by a foreign state," 28 U.S.C. § 1603(b)(2), because Powerex is wholly owned by BC Hydro rather than by the Province. Powerex is, in fact, directly and wholly owned by the Province, through its statutory agent, BC Hydro. Thus, Powerex does not advance the contention, rejected by this Court in *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474-75 (2003), that tiered or indirect ownership by a foreign sovereign suffices to establish foreign-state status under the FSIA. *Dole Food* casts no doubt on the traditional common-law rule that an agent (BC Hydro) can own property (Powerex) on behalf of its principal (the Province). This Court should grant review to correct the Ninth Circuit's misinterpretation of *Dole Food*.

IV. THIS COURT SHOULD CALL FOR A RESPONSE TO THE PETITION IN NO. 05-584 AND HOLD THIS PETITION PENDING THAT RESPONSE

Powerex's petitions in this case and No. 05-584 would serve as ideal companion cases for this Court's review of the questions presented in the petitions. No. 05-584 does not raise the mootness issues presented in this case, and this case is a direct appeal from the decision being used as precedent in the judgment underlying the decision being appealed in No. 05-584. California has waived response in No. 05-584. This Court should call for a response in that case, as it did here, and hold this petition pending that response. The Court should then grant both petitions, or the petition in No. 05-584 only, if this petition has been mooted in the interim. The court of appeals in No. 05-584 summarily dismissed Powerex's appeal based on the erroneous view that Powerex is not a foreign sovereign, which was the underlying holding of the court's decision here. Declining to hold this petition pending the response in No. 05-584 would leave this Court, if it subsequently granted certiorari in No. 05-584, in the anomalous position of reviewing a judgment in one case (No. 05-584) when the underlying substantive opinion was issued in another case (this one). Additionally, in light of the importance of the issues presented in these two petitions to international relations and commerce between the United States and Canada, this nation's largest trading partner, this Court should consider inviting the Solicitor General to file a brief expressing the views of the United States on these cases.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. Alternatively, the petition should be granted, and that part of the decision below addressing the sovereign status of Powerex should be vacated under *Munsingwear*, or held pending disposition of the petition in No. 05-584.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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February 16, 2007

PETITION FOR A WRIT OF CERTIORARI FILED: JULY 15, 2005
CERTIORARI GRANTED: JANUARY 19, 2007

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. CV 02-0990-RHW

RELIANT ENERGY SERVICES, INC., ET AL.,
Plaintiffs,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
5/21/02	1	Notice of Removal from SD Superior Court t/w copy of complaint; Case Number: 4204-00005 and 4204-00006 (to Magistrate Judge Larry A. Burns); Receipt No/Amt of Fee: 82747/$150; jury demand (dkt. clerk) (Entered: 05/21/2002)
		* * * * *
5/23/02	3	Notice by cross-defendant Bonneville Power, cross-defendant Western Area Power (both properly the United States of America) of filing additional ground for removal of civil action as this is a civil action against the US or an agency thereof. thereof. (mam) (Entered: 05/23/2002)
		* * * * *

5/31/02	6	Notice of Motion and Motion by cross-defendant Trans Canada Power to quash service of summons, to dismiss for lack of jurisdiction, [motion(s) referred to Judge Jeffrey T. Miller] motion hrg set for 7/15/02 at 10:30 (dkt clerk) Modified on 06/17/2002 (Entered: 06/03/2002)
5/31/02	7	Declaration of Ralph W. Tarr by cross-defendant Trans Canada Power re motion to quash service of summons [6-1], re motion to dismiss for lack of jurisdiction [6-2] (dkt clerk) (Entered: 06/03/2002)
5/31/02	8	Memorandum of points and authorities by cross-defendant Trans Canada Power in support of motion to quash service of summons [6-1], in support of motion to dismiss for lack of jurisdiction [6-2] (dkt clerk) (Entered: 06/03/2002)

* * * * *

6/12/02	14	Minutes: Enter Order that all judges in the USDC, Southern Dist of CA hereby recuse themselves from the above entitled case; Case reassigned to Judge Robert H. Whaley (dkt clerk) (Entered: 06/13/2002)
6/24/02	15	Notice of Motion and Motion by crs-dfts Arizona Elec Power, Avista Energy Inc, Silicon Valley Power, Idaho Power Company, Northern CA Power, Puget Sound Energy, Sacramento Municipal, Salt River Project, Sierra Pacific, Trans Alta Energy, Tucson Elec Power to dismiss cross-cmp for failure to state a claim [motion referred to Judge Robert H.

		Whaley]; motion hrg set for 9/19/02 at 8:30 (cag) (Entered: 06/26/2002)
6/24/02	16	Memorandum of points and authorities by crs-dfts Arizona Elec Power, Arizona Public Svc, Automated Power, Avista Energy Inc, Silicon Valley Power, Idaho Power Company, Northern CA Power, Puget Sound Energy, Sacramento Municipal, Salt River Project, Sierra Pacific, Trans Alta Energy, Tucson Elec Power in support of motion to dismiss cross-cmp for failure to state a claim [15-1] (cag) (Entered: 06/26/2002)
6/24/02	17	Request for Judicial Notice by crs-dfts Arizona Elec Power, Avista Energy Inc, Silicon Valley Power, Idaho Power Company, Northern CA Power, Puget Sound Energy, Sacramento Municipal, Salt River Project, Sierra Pacific, Trans Alta Energy, Tucson Elec Power motion to dismiss cross-cmp for failure to state a claim [15-1] (cag) (Entered: 06/26/2002)
6/24/02	18	Notice of Suppl Motion and Motion by crsdfts Silicon Valley Power, Northern CA Power, Sacramento Municipal, Salt River Project to dismiss cross-cmp for failure to state a claim [motion referred to Judge Robert H. Whaley]; motion hrg set for 9/19/02 at 8:30 (cag) (Entered: 06/26/2002)
6/24/02	19	Memorandum of points and authorities crsdfts by Silicon Valley Power, Northern CA Power, Sacramento Municipal, Salt River Project in support of motion to dismiss cross-cmp for failure to state a claim [18-1] (cag) (Entered: 06/26/2002)

* * * * *

6/26/02	21	Amended Notice of Motion and Motion submitted by Arizona Elec Power, Avista Energy Inc, Silicon Valley Power, Idaho Power Company, Northern CA Power, Puget Sound Energy, Sacramento Municipal, Salt River Project, Sierra Pacific, Trans Alta Energy, Tucson Elec Power to dismiss cross complaint for failure to state a claim [motion referred to Judge Robert H. Whaley]; motion hrg set for 8/7/02 at 10:00; NUNC PRO TUNC to 6/25/02 (cag) (Entered: 06/26/2002)
6/26/02	22	Amended Notice of suppl Motion and Motions submitted by Silicon Valley Power, Northern CA Power, Sacramento Municipal, Salt River Project to dismiss cross cmp for failure to state a claim [motion referred to Judge Robert H. Whaley]; motion hrg set for 8/7/02 at 10:00; NUNC PRO TUNC to 6/25/02 (cag) (Entered: 06/26/2002)

* * * * *

7/2/02	24	JOINDER by LA Dept of Water and Power joining suppl motion to dismiss cross cmp for failure to state a claim [22-1], motion to dismiss cross complaint for failure to state a claim [21-1] (cag) (Entered: 07/02/2002)
7/2/02	25	Request for Judicial Notice by LA Dept of Water and Power re joinder [24-1] (cag) (Entered: 07/02/2002)

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7/5/02	27	Notice of Joinder and JOINDER by Pacificorp, Pacificorp Power joining motion to dismiss cross complaint for failure to state a claim [21-1] (cag) (Entered: 07/08/2002)

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7/10/02	31	Notice of Motion and Motion by defendant Sempra Energy Corp, defendant Sempra Energy, defendant Sempra Energy to dismiss the fifth cause of action in plaintiffs' master complaint [motion(s) referred to Judge Robert H. Whaley] motion hrg set for 9/19/02 (bar) (Entered: 07/12/2002)
7/10/02	32	Memorandum of points and authorities by defendant Sempra Energy Corp, defendant Sempra Energy, defendant Sempra Energy in support of motion to dismiss the fifth cause of action in plaintiffs' master complaint [31-1] (bar) (Entered: 07/12/2002)
7/10/02	33	Request for Judicial Notice by defendant Sempra Energy Corp, defendant Sempra Energy, defendant Sempra Energy motion to dismiss the fifth cause of action in plaintiffs' master complaint [31-1] (bar) (Entered: 07/12/2002)

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7/10/02	38	Notice of Motion and Motion by cross-claimant Reliant Energy Svc, cross-claimant Reliant Ormond Beach, cross-claimant Reliant Energy, cross-claimant Reliant Ener Ellwood, cross-claimant Reliant Mandalay Inc, cross-claimant Reliant Coolwater to dismiss master complaint; [motion referred to Judge

Robert H. Whaley]; motion hrg set for 08/07/02 at 9:00 (kaj) (Entered: 07/16/2002)

7/10/02 39 Memorandum of points and authorities by cross-claimant Reliant Energy Svc, cross-claimant Reliant Ormond Beach, cross-claimant Reliant Energy, cross-claimant Reliant Ener Ellwood, cross-claimant Reliant Mandalay Inc, cross-claimant Reliant Coolwater in support of motion to dismiss master complaint [38-1] (kaj) (Entered: 07/16/2002)

7/10/02 40 Request for Judicial Notice by cross-claimant Reliant Energy Svc, cross-claimant Reliant Ormond Beach, cross-claimant Reliant Energy, cross-claimant Reliant Ener Ellwood, cross-claimant Reliant Mandalay Inc, cross-claimant Reliant Coolwater; motion to dismiss master complaint [38-1], motion to strike, motion to stay (kaj) (Entered: 07/16/2002)

7/10/02 41 Declaration of Todd R. Kinnear in support of request for judicial notice for cross-claimant Reliant Energy Svc, cross-claimant Reliant Ormond Beach, cross-claimant Reliant Energy, cross-claimant Reliant Ener Ellwood, cross-claimant Reliant Mandalay Inc, cross-claimant Reliant Coolwater re motion to dismiss master complaint [38-1] (kaj) (Entered: 07/16/2002)

7/10/02 42 Joint Notice of lodgment of individual complaints by cross-claimant Reliant Energy Svc, cross-claimant Reliant Ormond Beach, cross-claimant Reliant Energy, cross-claimant Reliant Ener

Ellwood, cross-claimant Reliant Mandalay Inc, cross-claimant Reliant Coolwater; motion to dismiss master complaint [38-1], motion to strike, motion to stay (kaj) (Entered: 07/16/2002)

7/10/02 43 Joint Notice of lodgment of FERC orders and other matters subject to dft's request for judicial notice by cross-claimant Reliant Energy Svc, cross-claimant Reliant Ormond Beach, cross-claimant Reliant Energy, cross-claimant Reliant Ener Ellwood, cross-claimant Reliant Mandalay Inc, cross-claimant Reliant Coolwater; motion to dismiss master complaint [38-1], motion to strike, motion to stay (volume 1 of 5 – includes exhs 1-12) (kaj) Modified on 07/16/2002 (Entered: 07/16/2002)

7/10/02 44 Joint Notice of lodgment of FERC orders and other matters subject to dft's request for judicial notice by cross-claimant Reliant Energy Svc, cross-claimant Reliant Ormond Beach, cross-claimant Reliant Energy, cross-claimant Reliant Ener Ellwood, cross-claimant Reliant Mandalay Inc, cross-claimant Reliant Coolwater; motion to dismiss master complaint [38-1], motion to strike, motion to stay (volume 2 of 5 – includes exhs 13-37.2) (kaj) Modified on 07/16/2002 (Entered: 07/16/2002)

7/10/02 45 Joint Notice of lodgment of FERC orders and other matters subject to dft's request for judicial notice by cross-claimant Reliant Energy Svc, cross-claimant Reliant Ormond Beach, cross-claimant Reliant Energy, cross-claimant

Reliant Ener Ellwood, cross-claimant Reliant Mandalay Inc, cross-claimant Reliant Coolwater; motion to dismiss master complaint [38-1], motion to strike, motion to stay (volume 3 of 5 – includes exh 38) (kaj) (Entered: 07/16/2002)

7/10/02 46 Joint Notice of lodgment of FERC orders and other matters subject to dft's request for judicial notice by cross-claimant Reliant Energy Svc, cross-claimant Reliant Ormond Beach, cross-claimant Reliant Energy, cross-claimant Reliant Ener Ellwood, cross-claimant Reliant Mandalay Inc, cross-claimant Reliant Coolwater; motion to dismiss master complaint [38-1], motion to strike, motion to stay (volume 4 of 5 – includes exh 39) (kaj) (Entered: 07/16/2002)

7/10/02 47 Joint Notice of lodgment of FERC orders and other matters subject to dft's request for judicial notice by cross-claimant Reliant Energy Svc, cross-claimant Reliant Ormond Beach, cross-claimant Reliant Energy, cross-claimant Reliant Ener Ellwood, cross-claimant Reliant Mandalay Inc, cross-claimant Reliant Coolwater; motion to dismiss master complaint [38-1], motion to strike, motion to stay (volume 5 of 5 – includes exh 40-49) (kaj) (Entered: 07/16/2002)

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7/12/02 49 JOINDER by Hafslund Energy joining motion to dismiss master complaint [38-1] (cag) (Entered: 07/16/2002)

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7/24/02	54	2nd Amended Motion submitted by Arizona Elec Power, Avista Energy Inc, Silicon Valley Power, Idaho Power Company, Northern CA Power, Puget Sound Energy, Sacramento Municipal, Salt River Project, Sierra Pacific Power, Trans Alta Energy, Tucson Elec Power to dismiss for failure to state a claim [motion referred to Judge Robert H. Whaley]; motion hrg set for 9/19/02 at 8:30; NUNC PRO TUNC to 7/23/02 (cag) (Entered: 07/24/2002)

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7/25/02	59	Memorandum of points and authorities by plaintiffs in support of motion to strike [58-1], in support of motion to sever cross-complaints [58-2] (cag) (Entered: 07/30/2002)
7/25/02	60	Declaration of Daniel E. Barenbaum re motion to strike [58-1], re motion to sever cross-complaints [58-2] (cag) (Entered: 07/30/2002)
7/25/02	61	Declaration of Frank J. Janecek, Jr. re motion to strike [58-1], re motion to sever cross-complaints [58-2] (cag) (Entered: 07/30/2002)
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8/9/02 78 Statement of non-opposition by cross-defendants to motion to dismiss master complaint [38-1] (bar) (Entered: 08/12/2002)

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8/9/02 80 Statement of non-opposition by cross-defendants to motion to dismiss master complaint [38-1] (bar) (Entered: 08/12/2002)

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8/9/02	83	Opposition by PP and L Montana LLC to motion to remand and motion to strike [58-1], motion to sever cross-complaints [58-2] (cag) (Entered: 08/12/2002)
8/9/02	84	Opposition by British Columbia to motion to remand and motion to strike [58-1], motion to sever cross-complaints [58-2] (cag) (Entered: 08/12/2002)
8/9/02	85	Declaration of Kenneth G. Peterson re motion response [84-1] (cag) (Entered: 08/12/2002)
8/9/02	86	Request for Judicial Notice by British Columbia (cag) (Entered: 08/12/2002)
8/9/02	87	Declaration of Christopher P. Barry re request for judicial notice [86-1] (cag) (Entered: 08/12/2002)
8/9/02	88	Opposition by Powerex Corp to motion to remand and motion to strike [58-1], motion to sever cross-complaints [58-2] (cag) (Entered: 08/12/2002)
8/9/02	89	Declaration of Kenneth G. Peterson re motion response [88-1] (cag) (Entered: 08/12/2002)
8/9/02	90	Request for Judicial Notice by Powerex Corp (cag) (Entered: 08/12/2002)

8/9/02	91	Declaration of Christopher P. Barry re request for judicial notice [90-1] (cag) (Entered: 08/12/2002)
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8/12/02	95	Request for Judicial Notice by Reliant dfts (cag) (Entered: 08/13/2002)
8/12/02	96	Notice of lodgment by Reliant dfts re opposition to motion to remand and motion to strike and/or sever crscmps (cag) (Entered: 08/13/2002)
		* * * * *
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8/14/02	101	Joint Opposition by Reliant crsclms to motion to dismiss crossclaims for failure to state a claim [54-1] (cag) (Entered: 08/15/2002)
8/14/02	102	Opposition by Reliant crsclms to motion to dismiss cross cmp for failure to state a claim [22-1] (cag) (Entered: 08/15/2002)
8/14/02	103	Declaration of Todd R. Kinnear re motion response [101-1] (cag) (Entered: 08/15/2002)

8/14/02	104	Request for Judicial Notice by Reliant crsclms re opposition [101-1] (cag) (Entered: 08/15/2002)
8/14/02	105	Suppl Notice of lodgment by Reliant crsclms re opposition [101-1] (cag) (Entered: 08/15/2002)
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8/22/02	114	Declaration by Valerie Lambert for cross-defendant British Columbia re motion to dismiss cross complaint [109-1] (jrl) (Entered: 08/23/2002)
8/22/02	115	Request for Judicial Notice by cross-defendant British Columbia motion to dismiss cross complaint [109-1] (jrl) (Entered: 08/23/2002)

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8/30/02	118	Opposition by Cruz M Bustamante, Barbara Matthews and General Public of State of CA to motion to dismiss the fifth cause of action in plaintiffs' master complaint [31-1] (cag) (Entered: 09/03/2002)
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8/30/02	120	Reply by Arizona Elec Power, Avista Energy Inc, Silicon Valley Power, Idaho Power Company, Northern CA Power, Puget Sound Energy, Sacramento Municipal, Salt River Project, Sierra Pacific, Trans Alta Energy, Tucson Elec Power to opposition to motion to dismiss for failure to state a claim [54-1] (cag) (Entered: 09/03/2002)
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		Northern CA Power, Puget Sound Energy, Sacramento Municipal, Salt River Project, Sierra Pacific, Trans Alta Energy, Tucson Elec Power to strike evidence submitted in support of jt opposition to motion to dismiss and opposition to motion to dismiss [motion referred to Judge Robert H. Whaley]; motion hrg set for 9/19/02 at 8:30 (cag) (Entered: 09/03/2002)
8/30/02	122	Reply by LA Dept of Water to joint opposition to motion to dismiss and opposition to motion to dismiss by public entity crsdfts (cag) (Entered: 09/03/2002)
8/30/02	123	Appendix of CA authorities re reply [122-1] by LA Dept of Water (cag) (Entered: 09/03/2002)
9/3/02	124	Supplemental response by USA re response to motion to remand [100-1] (cag) (Entered: 09/05/2002)
9/3/02	125	Reply by British Columbia to opposition to motion to dismiss cross complaint [109-1] (cag) (Entered: 09/05/2002)
9/3/02	126	Declaration of Douglas M. Butz re motion reply [125-1] (cag) (Entered: 09/05/2002)
9/3/02	127	Notice of lodgment by British Columbia re reply opposition to motion [125-1] (cag) (Entered: 09/05/2002)
9/4/02	128	Supplemental opposition by Reliant dfts re response to motion re foreign sovereign crsdfts [81-1] (cag) (Entered: 09/05/2002)

9/4/02	129	Declaration of Todd R. Kinnear re supplemental opposition [128-1] (cag) (Entered: 09/05/2002)
9/4/02	130	Declaration of Nora Cregan re supplemental opposition [128-1] (cag) (Entered: 09/05/2002)
9/4/02	131	Suppl Notice of lodgment re suppl opposition [128-1] (cag) (Entered: 09/05/2002)

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9/4/02	133	Memorandum by Powerex Corp in support of suppl brief re subject matter jurisdiction; NUNC PRO TUNC to 9/3/02 (cag) (Entered: 09/05/2002)
9/4/02	134	Declaration of Douglas M. Butz re memorandum [133-1]; NUNC PRO TUNC to 9/3/02 (cag) (Entered: 09/05/2002)
9/4/02	135	Notice of lodgment by Powerex Corp re suppl brief [133-1]; NUNC PRO TUNC to 9/3/02 (cag) (Entered: 09/05/2002)

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9/5/02	137	Reply by plaintiffs to opposition to motion to strike [58-1], motion to sever cross-complaints [58-2]; NUNC PRO TUNC to 9/4/02 (cag) (Entered: 09/05/2002)
9/5/02	138	Declaration of Barry R. Himmelstein re motion reply [137-1]; NUNC PRO TUNC to 9/4/02 (cag) (Entered: 09/05/2002)
9/10/02	139	Minutes of hrg on 9/4/02: Enter Order by Judge Robert H. Whaley; ct to prepare order. Court Reporter: Debra Clark (cag) (Entered: 09/11/2002)

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9/16/02	142	Joint Supplemental Response by Reliant crsdfts to USA's response to motion to remand and motion to strike and/or sever crsdfts; NUNC PRO TUNC to 9/6/02 (cag) (Entered: 09/17/2002)
		* * * * *
9/16/02	144	Notice of Errata and Response by Reliant crsclms to certain stmts in pla's reply memo re remand; NUNC PRO TUNC to 9/6/02 (cag) (Entered: 09/17/2002)
		* * * * *
9/16/02	146	Objs and Motion to strike portions of decls of Kenneth Spafford and Valerie Lambert re motion to dismiss; [motion referred to Judge Robert H. Whaley]; motion hrg set for 9/19/02 at 10:00; NUNC PRO TUNC to 9/6/02 (cag) Modified on 09/17/2002 (Entered: 09/17/2002)
		* * * * *
9/16/02	148	Opposition by Reliant dfts to motion to dismiss cross complaint [109-1]; NUNC PRO TUNC to 9/6/02 (cag) (Entered: 09/17/2002)
9/16/02	149	Declaration of Todd R. Kinnear re motion response [148-1]; NUNC PRO TUNC to 9/6/02 (cag) (Entered: 09/17/2002)
9/16/02	150	Declaration of John Pespisa re motion response [148-1]; NUNC PRO TUNC to 9/6/02 (cag) (Entered: 09/17/2002)
		* * * * *
9/16/02	152	Amd Exhibit B to decl of John Pespisa re opposition [150-1]; NUNC PRO

TUNC to 9/9/02 (cag) Modified on 09/17/2002 (Entered: 09/17/2002)

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9/16/02 154 Opposition by British Columbia to motion to strike portions of decls of Kenneth Spafford and Valerie Lambert re motion to dismiss [146-1]; NUNC PRO TUNC to 9/13/02 (cag) (Entered: 09/17/2002)

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9/16/02 156 Reply by British Columbia to opposition to motion to dismiss cross complaint [109-1]; NUNC PRO TUNC to 9/13/02 (cag) (Entered: 09/17/2002)

9/16/02 157 Declaration of Douglas M. Butz re motion reply [156-1]; NUNC PRO TUNC to 9/13/02 (cag) (Entered: 09/17/2002)

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9/17/02 162 Ex Parte Application by Reliant dfts for leave to file 2nd suppl brief in opposition to motion to remand and motion to dismiss (cag) Modified on 09/19/2002 (Entered: 09/19/2002)

9/17/02 163 Notice of filing of materials under seal by Reliant dfts (cag) Modified on 09/19/2002 (Entered: 09/19/2002)

9/18/02 160 Minutes: Enter Order by Mag Judge Burns recusing and ordering case be reassigned to another Mag Judge; Case referred to Magistrate Judge Anthony J. Battaglia (cag) (Entered: 09/19/2002)

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9/18/02	164	Opposition by coordinated plaintiffs to motion to dismiss master complaint [38-1] (cag) (Entered: 09/19/2002)
		* * * * *
9/18/02	166	Declaration of Frank J. Janecek re motion response [165-1], re motion response [164-1] (cag) (Entered: 09/19/2002)
9/18/02	167	Notice of lodgment by plaintiffs re opposition to motions [164-1], [165-1] (Volume 1 of 2) (cag) (Entered: 09/19/2002)
9/18/02	168	Notice of lodgment by plaintiffs re opposition to motions [164-1], [165-1] (Volume 2 of 2) (cag) (Entered: 09/19/2002)
9/18/02	169	Request for Judicial Notice by plaintiffs re opposition to motions [164-1], [165-1] (cag) (Entered: 09/19/2002)
		* * * * *
9/18/02	174	Sealed 2nd suppl brief in opposition to motion to remand and motion to dismiss (pursuant to Court Order) (cag) (Entered: 09/19/2002)
9/18/02	175	Sealed decl of Todd R. Kinnear (pursuant to Court Order) re [174-1] (cag) (Entered: 09/19/2002)
9/18/02	176	Sealed Notice of lodgment (pursuant to Court Order) re [174-1] (cag) (Entered: 09/19/2002)
9/18/02	177	Objections by British Columbia to [174-1] (cag) (Entered: 09/19/2002)
		* * * * *
9/19/02	179	Minutes: Enter Order by Magistrate Judge Anthony J. Battaglia recusing

from action and ordering another mag judge be assigned; Case referred to Magistrate Judge Louisa S. Porter (cag) (Entered: 09/20/2002)

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9/23/02 182 Minutes: Enter Order by Magistrate Judge Louisa S. Porter recusing and requesting another mag judge be assigned; Case referred to Magistrate Judge Ruben B. Brooks (cag) (Entered: 09/26/2002)

10/1/02 183 Minutes: Each and all of the magistrate judges for the United States District Court for the Southern District of CA recuse themselves from this case. Case referred to Unassigned Court Reporter: n/a (Nunc pro tunc to 9/6/02) (dkt clerk) (Entered: 10/01/2002)

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10/18/02 188 Order by Judge Robert H. Whaley granting ex parte application for leave to file 2nd suppl brief in opposition to motion to remand and motion to dismiss [162-1]; crsdfts BC Hydro and Powerex shall have 10 days from date of this order to file 2nd suppl brief in opposition (cag) (Entered: 10/21/2002)

10/29/02 189 Reply by Reliant Energy Svc, Reliant Ormond Beach, Reliant Energy, Reliant Ener Ellwood, Reliant Mandalay Inc, Reliant Coolwater to opposition to motion to dismiss master complaint [38-1] (cag) (Entered: 10/30/2002)

10/29/02	190	Declaration of Todd R. Kinnear re motion reply [189-1] (cag) (Entered: 10/30/2002)
10/29/02	191	Request for Judicial Notice by Reliant dfts re motion reply 189 (cag) (Entered: 10/30/2002)
10/29/02	192	Joint Notice of lodgment by Reliant dfts re motion reply 189 (cag) (Entered: 10/30/2002)
11/4/02	193	Document Sealed (pursuant to Court Order) (ksr) (Entered: 11/05/2002)
11/4/02	194	Document Sealed (pursuant to Court Order) (ksr) (Entered: 11/05/2002)
11/4/02	195	Document Sealed (pursuant to Court Order) (ksr) (Entered: 11/05/2002)

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12/16/02	201	Ex Parte Application of Duke Energy and Reliant Energy dfts for stay of remand pending resolution of appeal, ruling on pending appl for service order (cag) (Entered: 12/17/2002)
12/16/02	203	Notice of appeal by cross-claimant Reliant Energy Svc, cross-claimant Reliant Ormond Beach, cross-claimant Reliant Energy, cross-claimant Reliant Ener Ellwood, cross-claimant Reliant Mandalay Inc, cross-claimant Reliant Coolwater from Dist. Court decision entered on 12/17/02. Receipt No/Amt of Fee: Not Paid [202-2] (dkt clerk) (Entered: 12/18/2002)
12/17/02	202	Order by Judge Robert H. Whaley granting plas' motion to remand, motion to strike [58-1] and motion to sever cross-complaints [58-2]; remanding case

		to state court (per req of ct, order not sent to state ct until appl to stay remand heard) (cag) (Entered: 12/17/2002)
12/17/02	204	Ex Parte Application by Powerex Corp for stay of remand pending resolution of appeal to 9th circuit (cag) (Entered: 12/18/2002)
12/18/02		Notice of appeal sent to Circuit Court [203-1] (dkt clerk) (Entered: 12/18/2002)
		* * * * *
12/18/02	238	Notice of appeal by defendant Duke Energy Trading from Dist. Court decision entered on 12/17/02. Receipt No/Amt of Fee: $105.00 [202-2], t/w Representation statement (dkt clerk) Modified on 02/07/2003 (Entered: 02/07/2003)
		* * * * *
1/6/03	209	Memorandum by plaintiffs in opposition to applications for stay of remand [204-1], [201-1] (cag) (Entered: 01/07/2003)
1/6/03	210	Declaration of Barry Himmelstein re memorandum in opposition [209-1] (cag) (Entered: 01/07/2003)
1/7/03	211	Motion by USA for clarification of order granting motion to remand; [motion referred to Judge Robert H. Whaley] (cag) (Entered: 01/09/2003)
1/10/03	214	Notice of Motion and Motion by Powerex Corp for reconsideration; [motion referred to Judge Robert H. Whaley] (cag) (Entered: 01/14/2003)
1/10/03	215	Memorandum of points and authorities by Powerex Corp in support of motion

for reconsideration [214-1] (cag) (Entered: 01/14/2003)

1/10/03 216 LR 7.1(i) Certified Statement by Powerex Corp re motion for reconsideration [214-1] (cag) (Entered: 01/14/2003)

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1/13/03 213 Response by Arizona Elec Power, Avista Energy Inc, Idacorp Energy, Silicon Valley Power, Idaho Power Company, Northern CA Power, Puget Sound Energy, Sacramento Municipal, Salt River Project, Sierra Pacific, Trans Alta Energy, Tucson Elec Power to ex parte appl for stay of remand pending appeal; NUNC PRO TUNC to 1/7/03 (cag) (Entered: 01/13/2003)

1/13/03 217 Reply by Powerex Corp re appl for stay of remand [204-1] (cag) (Entered: 01/14/2003)

1/13/03 218 Reply by Reliant Entity and Duke Energy dfts re appl for stay of remand [201-1] (cag) (Entered: 01/14/2003)

1/13/03 219 Declaration of John T. Brooks re reply [218-1] (cag) (Entered: 01/14/2003)

1/13/03 220 Memorandum by LA Dept of Water in opposition to application for stay of remand [201-1] (cag) (Entered: 01/14/2003)

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1/13/03 224 Notice of appeal by cross-defendant Powerex Corp from Dist. Court decision entered on 12/17/02. Receipt No/Amt of Fee: $105.00, 090333 [202-2] (dkt clerk) (Entered: 01/14/2003)

1/14/03		Notice of appeal sent to Circuit Court [224-1] (dkt clerk) (Entered: 01/14/2003)
		* * * * *
1/15/03	226	Notification by Circuit Court of Appellate Docket Number [203-1] 02-57202 (dkt clerk) (Entered: 01/16/2003)
		* * * * *
1/27/03	228	Order by Judge Robert H. Whaley denying ex parte application to stay remand [201-1], denying ex parte application to stay remand [204-1], re motion for reconsideration [214-1]: opposition to motion due by 1/31/03, reply to opposition to motion due by 2/5/03; motion hearing set for 2/7/03 before Judge Robert Whaley w/o oral argument (cag) (Entered: 01/27/2003)
1/27/03	229	Notification by Circuit Court of Appellate Docket Number [224-1] 03-55131 (dkt clerk) (Entered: 01/27/2003)
		* * * * *
1/29/03	232	Notification by Circuit Court of Appellate Docket Number [203-1] 02-57202 (dkt clerk) (Entered: 01/29/2003)
		* * * * *
2/3/03	234	Opposition by plaintiffs to motion for reconsideration [214-1]; NUNC PRO TUNC to 1/31/03 (cag) (Entered: 02/03/2003)
2/3/03	235	Order by Judge Robert H. Whaley denying motion for clarification of order granting motion to remand [211-1] (cag) (Entered: 02/03/2003)
		* * * * *

2/5/03	237	Reply by Powerex Corp to opposition to motion for reconsideration [214-1] (cag) (Entered: 02/06/2003)
2/7/03		Notice of appeal sent to Circuit Court [238-1] (dkt clerk) (Entered: 02/07/2003)
2/14/03	241	Notice of appeal by cross-defendant USA, cross-defendant Department of Energy, cross-defendant Bonneville Power, cross-defendant Western Area Power from Dist. Court decision entered on 12/17/02. Receipt No/Amt of Fee: No Fee Required [202-2] (dkt clerk) (Entered: 02/18/2003)
2/14/03	242	Copy of Appellate Court Order ordering the appellee to respond to the emergency motion to stay the remand by 2/14/03 and reply due 2/19/03 (dkt clerk) (Entered: 02/18/2003)
2/18/03		Notice of appeal sent to Circuit Court [241-1] (dkt clerk) (Entered: 02/18/2003)
		* * * * *
2/21/03	244	Notification by Circuit Court of Appellate Docket Number [238-1] 03-55266 (dkt clerk) (Entered: 02/24/2003)
		* * * * *
2/24/03		Transcript of motion hrg on 1/23/03 before Judge Whaley filed (cag) (Entered: 02/25/2003)
		* * * * *
3/6/03	249	Notification by Circuit Court of Appellate Docket Number [241-1] 03-55349 (dkt clerk) (Entered: 03/07/2003)
		* * * * *

5/27/03	252	Copy of Appellate Court Order staying the proceedings for 120 days as to NRG; the current briefing schedule remains in place as to the remainder of the parties (dkt clerk) (Entered: 05/28/2003)
		* * * * *
1/16/04	256	Stipulation to dismiss cross cmp as to Salt River Project and Order thereon by Judge Robert H. Whaley; terminating party Salt River Project (cag) (Entered: 01/16/2004)
1/21/04	257	Order by Judge Robert H. Whaley denying as moot motion for reconsideration [214-1] w/ leave to renew (cag) (Entered: 01/21/2004)
		* * * * *
3/28/05		Received judgement from USCA. Forwarded copy to Court Clerk for calendar. (affirmed/vacated/remanded) (dkt clerk) (Entered: 04/06/2005)
4/7/05	267	Certified copy of judgment from USCA affirming the decision of the District Court re: appeal [241-1], affirming the decision of the District Court re: appeal [224-1], affirming the decision of the District Court re: appeal [238-1], affirming the decision of the District Court re: appeal [203-1] (dkt clerk) (Entered: 04/07/2005)
5/11/05	268	Order by Judge Robert H. Whaley terminating dfts Western Power, Bonneville Power pursuant to 9th Circuit order (cag) (Entered: 05/12/2005)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. CV 02-1000-RHW

DUKE ENERGY TRADING AND MARKETING, LLC, ET AL.,
Plaintiffs,

v.

ARIZONA PUBLIC SERVICE COMPANY, ET AL.,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
		* * * * *
5/22/02	1	Notice of Removal from SD Superior Court t/w copy of complaint; Case Number: 4204 & 4205 (to Magistrate Judge John A. Houston); Receipt No/Amt of Fee: 82812/$150; jury demand (dkt clerk) (Entered: 05/22/2002)
		* * * * *
5/30/02	5	Minutes: Enter Order by Judge M. J. Lorenz recusing himself, case reassigned to Judge Jeffrey T. Miller Court Reporter: n/a (dkt clerk) (Entered: 06/03/2002)
6/12/02	6	Minutes: Enter Order that all Judges in the USDC, Southern Dist of CA hereby recuse themselves from the above entitled case; Case reassigned to Judge

Robert H. Whaley (dkt clerk) (Entered: 06/13/2002)

6/24/02	7	Notice of Motion and Motion by crs-dfts Avista Energy Inc, IDACORP Energy LP, Puget Sound Energy, Tucson Elec Power Co to dismiss cross-complaint for failure to state a claim; [motion referred to Judge Robert H. Whaley]; motion hrg set for 9/19/02 at 8:30 (cag) (Entered: 06/26/2002)
6/24/02	8	Memorandum of points and authorities by crs-dfts Avista Energy Inc, IDACORP Energy LP, Puget Sound Energy, Tucson Elec Power Co in support of motion to dismiss cross-complaint for failure to state a claim [7-1] (cag) (Entered: 06/26/2002)
6/24/02	9	Request for Judicial Notice by crs-dfts Avista Energy Inc, IDACORP Energy LP, Puget Sound Energy, Tucson Elec Power Co motion to dismiss cross-complaint for failure to state a claim [7-1] (cag) (Entered: 06/26/2002)
6/26/02	10	Amended Notice of Motion and Motion submitted by Avista Energy Inc, IDACORP Energy LP, Puget Sound Energy, Tucson Elec Power Co to dismiss cross cmp for failure to state a claim; [motion referred to Judge Robert H. Whaley]; motion hrg set for 8/7/02 at 10:00; NUNC PRO TUNC to 6/25/02 (cag) (Entered: 06/26/2002)

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7/10/02	16	Notice of Motion and Motion by defendant Riliant Energy service Inc, Reliant Ormond LLC, Reliant Energy Etiwanda

		LLC, Reliant Energy Ellwood LLC, Reliant Energy Mandalay LLC, and Reliant Energy Coolwater LLC; to dismiss master complaint [motion(s) referred to Judge Robert H. Whaley]; motion hrg set for 08/07/02 9:00 (joeh) (Entered: 07/16/2002)
7/10/02	17	Memorandum of points and authorities by Reliant Energy Service Inc, Reliant Ormond LLC, Reliant Energy Etiwanda LLC, Reliant Energy Ellwood LLC, Reliant Energy Mandalay LLC, and Reliant Energy Coolwater LLC, in support of motion to dismiss master complaint [16-1] (joeh) Modified on 07/16/2002 (Entered: 07/16/2002)
7/10/02	18	Declaration of Todd R Kinnear in support of request for judicial notice by defendant Reliant Energy Service Inc, Reliant Ormond LLC, Reliant Energy Etiwanda LLC, Reliant Energy Ellwood LLC, Reliant Energy Mandalay LLC, and Reliant Energy Coolwater LLC, re motion to dismiss master complaint [16-1] (joeh) Modified on 07/16/2002 (Entered: 07/16/2002)
7/10/02	19	Request for Judicial Notice in support by defendant Reliant Energy Service Inc, Reliant Ormond LLC, Reliant Energy Etiwanda LLC, Reliant Energy Ellwood LLC, Reliant Energy Mandalay LLC, and Reliant Energy Coolwater LLC, motion to dismiss master complaint [16-1], motion to strike and to stay (joeh) Modified on 07/16/2002 (Entered: 07/16/2002)

7/10/02	20	Joint notice of lodgment of federal energy regulatory commission orders and other matters subject to dft's request for Judicial notice in support by defendant Reliant Energy Service Inc, Reliant Ormond LLC, Reliant Energy Etiwanda LLC, Reliant Energy Ellwood LLC, Reliant Energy Mandalay LLC, and Reliant Energy Coolwater LLC; motion to dismiss master complaint [16-1]; motion to strike and motion to stay (joeh) Modified on 07/16/2002 (Entered: 07/16/2002)
		* * * * *
7/15/02	24	Minutes: Enter Order by Magistrate Judge John A. Houston recusing from case and directing another magistrate judge be assigned; Case referred to Magistrate Judge Anthony J. Battaglia (cag) (Entered: 07/16/2002)
7/16/02	21	Joint notice of lodgment of individual complaints in support by defendant Reliant Energy Service Inc, Reliant Ormond LLC, Reliant Energy Etiwanda LLC, Reliant Energy Ellwood LLC, Reliant Energy Mandalay LLC, and Reliant Energy Coolwater LLC; motion to dismiss master complaint [16-1], motion to strike and motion to stay (joeh) (Entered: 07/16/2002)
		* * * * *
7/22/02	27	Minutes: Enter Order by Magistrate Judge Anthony J. Battaglia recusing and directing clk to assign another mag judge; Case referred to Magistrate Judge Nita L. Stormes (cag) (Entered: 07/24/2002)

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7/24/02	29	2nd Amended Motion submitted by Avista Energy Inc, IDACORP Energy LP, Puget Sound Energy, Tucson Elec Power Co to dismiss for failure to state a claim; [motion referred to Judge Robert H. Whaley]; motion hrg set for 9/19/02 at 8:30; NUNC PRO TUNC to 7/23/02 (cag) (Entered: 07/24/2002)

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7/29/02	31	JOINDER by MIECO Inc joining motion to dismiss for failure to state a claim [29-1] (cag) (Entered: 07/30/2002)

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7/31/02	33	JOINDER by Public Service Co NM joining motion to dismiss for failure to state a claim [29-1]; NUNC PRO TUNC to 7/30/02 (cag) (Entered: 08/01/2002)

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8/9/02	38	Opposition by Reliant Energy Svc, Reliant Ormond Beach, Reliant Energy, Reliant Energy Ell, Reliant Energy Mand, Reliant Energy Cool to motion to remand (cag) (Entered: 08/12/2002)
8/9/02	39	Opposition by British Columbia to motion to remand and motion to strike and/or sever crscmps (cag) (Entered: 08/12/2002)
8/9/02	40	Declaration of Kenneth G. Peterson re motion response [39-1] (cag) (Entered: 08/12/2002)
8/9/02	41	Request for Judicial Notice by British Columbia (cag) (Entered: 08/12/2002)

8/9/02	42	Declaration of Christopher P. Barry re request for judicial notice [41-1] (cag) (Entered: 08/12/2002)
8/9/02	43	Opposition by Powerex Corp to motion to remand and motion to strike and/ or sever crscmps (cag) (Entered: 08/12/2002)
8/9/02	44	Declaration of Kenneth G. Peterson re motion response [43-1] (cag) (Entered: 08/12/2002)
8/9/02	45	Request for Judicial Notice by Powerex Corp (cag) (Entered: 08/12/2002)
8/9/02	46	Declaration of Christopher P. Barry re request for judicial notice [45-1] (cag) (Entered: 08/12/2002)

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8/12/02	48	Declaration of Todd R. Kinnear re motion response [38-1] (cag) (Entered: 08/13/2002)
8/12/02	49	Declaration of Joel B. Kleinman re motion response [38-1] (cag) (Entered: 08/13/2002)
8/12/02	50	Notice of lodgment by Reliant Energy Svc, Reliant Ormond Beach, Reliant Energy, Reliant Energy Ell, Reliant Energy Mand, Reliant Energy Cool re opposition to motion to remand and motion to strike and/or sever crscmps (cag) (Entered: 08/13/2002)
8/12/02	51	Request for Judicial Notice by Reliant Energy Svc, Reliant Ormond Beach, Reliant Energy, Reliant Energy Ell, Reliant Energy Mand, Reliant Energy Cool re opposition to motion to remand and

		motion to strike and/or sever crscmps (cag) (Entered: 08/13/2002)
8/14/02	52	Opposition by crsdfts USA, Department of Energy, Bonneville Power, Western Area Power to motion to remand and motion to strike and/or sever crscmps (cag) (Entered: 08/15/2002)
8/14/02	53	Joint Opposition by Reliant dfts to motion to dismiss for failure to state a claim [29-1] (cag) (Entered: 08/15/2002)
8/14/02	54	Opposition by Reliant dfts to motion to dismiss (cag) (Entered: 08/15/2002)
8/14/02	55	Declaration of Todd R. Kinnear re motion response [53-1] (cag) (Entered: 08/15/2002)
8/14/02	56	Request for Judicial Notice by Reliant dfts re opposition [53-1] (cag) (Entered: 08/15/2002)
8/14/02	57	Notice of lodgment by Reliant dfts re opposition [53-1] (cag) (Entered: 08/15/2002)
8/15/02	58	JOINDER by Powerex Corp joining motion to dismiss for failure to state a claim [29-1] (cag) (Entered: 08/16/2002)
8/15/02	59	JOINDER by British Columbia joining motion to dismiss for failure to state a claim [29-1] (cag) (Entered: 08/16/2002)
8/22/02	60	Notice of Motion and Motion by cross-defendant British Columbia to dismiss cross complaint [motion referred to Judge Robert H. Whaley] motion hrg set for 9/19/02 at 2:00 (jrl) (Entered: 08/23/2002)

8/22/02	61	Memorandum of points and authorities by cross-defendant British Columbia in support of motion to dismiss cross complaint [60-1] (jrl) (Entered: 08/23/2002)
8/22/02	62	Declaration by Christopher P. Barry for cross-defendant British Columbia re motion to dismiss cross complaint [60-1] (jrl) (Entered: 08/23/2002)
8/22/02	63	Declaration by Christopher P. Barry for cross-defendant British Columbia re motion to dismiss cross complaint [60-1] (jrl) (Entered: 08/23/2002)
8/22/02	64	Declaration by Kenneth Spafford for cross-defendant British Columbia re motion to dismiss cross complaint [60-1] (jrl) (Entered: 08/23/2002)
8/22/02	65	Declaration by Valerie Lambert for cross-defendant British Columbia re motion to dismiss cross complaint [60-1] (jrl) (Entered: 08/23/2002)
8/22/02	66	Request for Judicial Notice by cross-defendant British Columbia motion to dismiss cross complaint [60-1] (jrl) (Entered: 08/23/2002)
8/29/02	67	Notice of errata by British Columbia; NUNC PRO TUNC to 8/27/02 (cag) (Entered: 08/29/2002)
9/3/02	68	Reply by British Columbia to opposition to motion to dismiss cross complaint [60-1] (cag) (Entered: 09/05/2002)
9/3/02	69	Declaration of Douglas M. Butz re motion reply [68-1] (cag) (Entered: 09/05/2002)

9/3/02	70	Notice of lodgment by British Columbia re reply to opposition to motion [68-1] (cag) (Entered: 09/05/2002)
9/4/02	71	Memorandum by Powerex Corp in support of suppl brief re subject matter jurisdiction; NUNC PRO TUNC to 9/3/02 (cag) (Entered: 09/05/2002)
9/4/02	72	Declaration of Douglas M. Butz re memorandum [71-1]; NUNC PRO TUNC to 9/3/02 (cag) (Entered: 09/05/2002)
9/4/02	73	Notice of lodgment by Powerex Corp re suppl brief [71-1] (cag) (Entered: 09/05/2002)
9/4/02	74	Suppl Opposition by Duke dfts to motion to remand re foreign sovereign crsdfts (cag) (Entered: 09/06/2002)
9/4/02	75	Declaration of Nora Cregan re motion response [74-1] (cag) (Entered: 09/06/2002)
9/4/02	76	Declaration of Rodd R. Kinnear re motion response [74-1] (cag) (Entered: 09/06/2002)
9/4/02	77	Notice of lodgment by Duke dfts re opposition [74-1] (cag) (Entered: 09/06/2002)
9/10/02	78	Minutes of hrg on 9/4/02: Enter Order by Judge Robert H. Whaley; ct to prepare order. Court Reporter: Debra Clark (cag) (Entered: 09/11/2002)

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9/16/02	81	Reply by British Columbia to opposition to motion to dismiss cross complaint

[60-1]; NUNC PRO TUNC to 9/4/02 (cag) (Entered: 09/17/2002)

9/16/02 82 Declaration of Douglas M. Butz re motion reply [81-1]; NUNC PRO TUNC to 9/4/02 (cag) (Entered: 09/17/2002)

9/16/02 83 Objs and Motion to strike portions of decls of Kenneth Spafford and Valerie Lambert re motion to dismiss; [motion referred to Judge Robert H. Whaley]; motion hrg set for 9/19/02 at 10:00; NUNC PRO TUNC to 9/6/02 (cag) (Entered: 09/17/2002)

9/16/02 84 Amd Exhibit B filed to decl of John Pespisa (in 02cv990) (cag) (Entered: 09/17/2002)

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9/16/02 86 Opposition by British Columbia to objs and motion to strike portions of decls of Kenneth Spafford and Valerie Lambert re motion to dismiss [83-1]; NUNC PRO TUNC to 9/13/02 (cag) (Entered: 09/17/2002)

9/16/02 87 Opposition by Reliant dfts to motion to dismiss cross complaint [60-1] (cag) (Entered: 09/17/2002)

9/16/02 88 Declaration of Todd R. Kinnear re motion response [87-1] (cag) (Entered: 09/17/2002)

9/16/02 89 Declaration of John Pespisa re motion response [87-1] (cag) (Entered: 09/17/2002)

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9/17/02 91 Ex Parte Application by Reliant dfts for leave to file 2nd suppl brief in opposition

		to motion to remand and motion to dismiss (cag) (Entered: 09/19/2002)
9/17/02	92	Notice of filing by Reliant dfts of materials under seal (cag) (Entered: 09/19/2002)
		* * * * *
9/18/02	97	Sealed 2nd suppl brief in opposition to motion to remand and motion to dismiss (pursuant to Court Order) (cag) (Entered: 09/19/2002)
9/18/02	98	Sealed decl of Todd R. Kinnear (pursuant to Court Order) re [97-1] (cag) (Entered: 09/19/2002)
9/18/02	99	Sealed notice of lodgment (pursuant to Court Order) re [97-1] (cag) (Entered: 09/19/2002)
9/18/02	100	Objections by British Columbia to [97-1] (cag) (Entered: 09/19/2002)
		* * * * *
9/30/02	102	Minutes: Enter Order by Magistrate Judge Nita L. Stormes recusing and requesting another mag judge be assigned; Case referred to Magistrate Judge Louisa S. Porter (cag) (Entered: 10/02/2002)
		* * * * *
10/18/02	105	Order by Judge Robert H. Whaley granting ex parte application for leave to file 2nd suppl brief in opposition to motion to remand and motion to dismiss [91-1]; crsdfts BC Hydro and Powerex shall have 10 days to file 2nd suppl brief (cag) (Entered: 10/21/2002)

10/28/02	106	Minutes: Enter Order recusing all Mag Judges of SDCA; Case referred to case Unassigned (cag) (Entered: 10/28/2002)
10/29/02	107	Reply by Reliant Energy Svc, Reliant Ormond Beach, Reliant Energy, Reliant Energy Ell, Reliant Energy Mand, Reliant Energy Cool to opposition to motion to dismiss master complaint [16-1] (cag) (Entered: 10/30/2002)
10/29/02	108	Declaration by Reliant dfts re motion reply [107-1] (cag) (Entered: 10/30/2002)
10/29/02	109	Request for Judicial Notice by Reliant dfts re motion reply 107 (cag) (Entered: 10/30/2002)
10/29/02	110	Notice of lodgment by Reliant dfts re motion reply 107 (cag) (Entered: 10/30/2002)
11/4/02	111	Document Sealed (pursuant to Court Order) (ksr) (Entered: 11/05/2002)
11/4/02	112	Document Sealed (pursuant to Court Order) (ksr) (Entered: 11/05/2002)
11/4/02	113	Document Sealed (pursuant to Court Order) (ksr) (Entered: 11/05/2002)
11/4/02	114	Document Sealed (pursuant to Court Order) (ksr) (Entered: 11/05/2002)
11/4/02	115	Document Sealed (pursuant to Court Order) (ksr) (Entered: 11/05/2002)

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12/16/02	121	Ex Parte Application of Duke Energy and Reliant Energy dfts for stay of remand pending resolution of appeal, ruling on pending appl for service order (cag) (Entered: 12/17/2002)

12/16/02	123	Notice of appeal by defendant Reliant Energy Svc, defendant Reliant Ormond Beach, defendant Reliant Energy, defendant Reliant Energy Ell, defendant Reliant Energy Mand, defendant Reliant Energy Cool from Dist. Court decision entered on 12/17/02. Receipt No/ Amt of Fee: Not Paid [122-2] (dkt clerk) (Entered: 12/18/2002)
12/17/02	122	Order by Judge Robert H. Whaley granting plas' motion to remand, motion to strike and motion to sever cross-complaints; remanding case to state court (per req of ct, order not sent to state ct until appl to stay remand heard) (cag) (Entered: 12/17/2002)
12/17/02	124	Ex Parte Application by Powerex Corp for stay of remand pending resolution of appeal to 9th circuit (cag) (Entered: 12/18/2002)
12/18/02		Notice of appeal sent to Circuit Court [123-1] (dkt clerk) (Entered: 12/18/2002)

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12/18/02	149	Notice of appeal by cross-claimant Duke Energy Trading, cross-claimant Duke Energy Morro, cross-claimant Duke Energy Moss, cross-claimant Duke Energy South, cross-claimant Duke Energy Oakland from Dist. Court decision entered on 12/17/02. Receipt No/Amt of Fee: $105.00 [122-2], t/w representation statement (dkt clerk) Modified on 02/07/2003 (Entered: 02/07/2003)

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1/2/03	127	Notification by Circuit Court of Appellate Docket Number [123-1] 02-57210 as to Reliant appeal (dkt clerk) (Entered: 01/03/2003)

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1/7/03	131	Motion by USA for clarification of order granting motion to remand; [motion referred to Judge Robert H. Whaley] (cag) (Entered: 01/09/2003)
1/10/03	132	Notice of Motion and Motion by Powerex Corp for reconsideration; [motion referred to Judge Robert H. Whaley] (cag) (Entered: 01/14/2003)
1/10/03	133	Memorandum of points and authorities by Powerex Corp in support of motion for reconsideration [132-1] (cag) (Entered: 01/14/2003)
1/10/03	134	LR 7.1(i) Certified Statement by Powerex Corp re motion for reconsideration [132-1] (cag) (Entered: 01/14/2003)
1/13/03	135	Reply by Powerex Corp re appl for stay of remand [124-1] (cag) (Entered: 01/14/2003)
1/13/03	136	Reply by Duke Energy and Reliant Entity dfts re appl for stay of remand [121-1] (cag) (Entered: 01/14/2003)
1/13/03	137	Declaration of John T. Brooks re reply [136-1] (cag) (Entered: 01/14/2003)

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1/13/03	139	Notice of appeal by cross-defendant Powerex Corp from Dist. Court decision entered on 12/17/02. Receipt No/Amt of Fee: $105.00, 090332 [122-2] (dkt clerk) (Entered: 01/14/2003)

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1/14/03		Notice of appeal sent to Circuit Court [139-1] (dkt clerk) (Entered: 01/14/2003)

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1/24/03	142	Notification by Circuit Court of Appellate Docket Number [139-1] 03-55118 (dkt clerk) (Entered: 01/24/2003)

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1/27/03	144	Order by Judge Robert H. Whaley denying ex parte application for stay of remand [121-1], denying ex parte application for stay of remand [124-1], re motion for reconsideration [132-1]: opposition to motion due by 1/31/03, reply to opposition to motion due by 2/5/03, motion hearing set for 2/7/03 before Judge Robert Whaley w/o oral argument (cag) (Entered: 01/27/2003)

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2/3/03	146	Order by Judge Robert H. Whaley denying motion for clarification of order granting motion to remand [131-1] (cag) (Entered: 02/03/2003)

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2/5/03	148	Reply by Powerex Corp to opposition to motion for reconsideration [132-1] (cag) (Entered: 02/06/2003)
2/7/03		Notice of appeal sent to Circuit Court [149-1] (dkt clerk) (Entered: 02/07/2003)
2/14/03	152	Notice of appeal by cross-defendant USA, cross-defendant Department of Energy, cross-defendant Bonneville Power, cross-defendant Western Area Power from Dist. Court decision entered

		on 2/12/02. Receipt No/Amt of Fee: No Fee Required [122-2] (dkt clerk) (Entered: 02/18/2003)
2/18/03		Notice of appeal sent to Circuit Court [152-1] (dkt clerk) (Entered: 02/18/2003)
		* * * * *
2/24/03		Transcript of motion hrg on 1/23/03 before Judge Whaley filed (original in 02cv990) (cag) (Entered: 02/25/2003)
3/3/03	154	Notification by Circuit Court of Appellate Docket Number [152-1] 03-55319 (dkt clerk) (Entered: 03/04/2003)
3/3/03	155	Notification by Circuit Court of Appellate Docket Number [149-1] 03-55241 (dkt clerk) (Entered: 03/04/2003)
		* * * * *
5/27/03	157	Copy of Appellate Court Order staying the proceedings for 120 days as to NRG; the current briefing schedule remains in place as to the remaining parties (dkt clerk) (Entered: 05/28/2003)
9/2/03	158	Copy of Appellate Court Order referring the 6/25/03 motion to intervene or for leave to file Amici Curiae brief is referred to panel assigned to hear the merits of these consolidated appeals (dkt clerk) (Entered: 09/03/2003)
9/2/03	159	Copy of Appellate Court Order referring the 6/25/03 motion to intervene or for leave to file an Amici Curiae brief to the panel assigned to hear the merits of these consolidated appeals (dkt clerk) (Entered: 09/03/2003)

1/21/04	160	Order by Judge Robert H. Whaley denying as moot motion for reconsideration [132-1] w/ leave to renew (cag) (Entered: 01/21/2004)

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3/28/05		Received judgement from USCA. Forwarded copy to Court Clerk for calendar. (affirmed/vacated/remanded) (dkt clerk) (Entered: 04/06/2005)
4/7/05	163	Certified copy of judgment from USCA affirming the decision of the District Court re: appeal [152-1], affirming the decision of the District Court re: appeal [139-1], affirming the decision of the District Court re: appeal [149-1], affirming the decision of the District Court re: appeal [123-1] (dkt clerk) (Entered: 04/07/2005)
5/11/05	164	Order by Judge Robert H. Whaley terminating dfts Western Area Power, Bonneville Power pursuant to 9th Circuit order (cag) (Entered: 05/12/2005)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. CV 02-1001-RHW

RELIANT ENERGY SERVICES, INC., ET AL.,
Plaintiffs,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
		* * * * *
5/22/02	1	Notice of Removal from SD Superior Court Case Number: 4204-0005 and 4204-00006 (to Magistrate Judge Louisa S. Porter); Receipt No/Amt of Fee: 82814/$150; jury demand (dkt clerk) (Entered: 05/23/2002)
		* * * * *
5/31/02	5	Order by Judge Rudi M. Brewster, the court recuses itself from this action; the Case is now reassigned to Judge Thomas J. Whelan (dkt clerk) (Entered: 05/31/2002)
5/31/02	6	Notice of Motion and Motion by cross-defendant Trans Canada Power to quash service of summons, to dismiss for lack of jurisdiction, [motion(s) referred to Judge Jeffrey T. Miller] motion hrg

set for 7/1/02 at 10:30 (dkt clerk) Modified on 06/12/2002 (Entered: 06/03/2002)

5/31/02 7 Declaration of Ralph W Tarr by cross-defendant Trans Canada Power re motion to quash service of summons [6-1], re motion to dismiss for lack of jurisdiction [6-2] (dkt clerk) (Entered: 06/03/2002)

5/31/02 8 Memorandum of points and authorities by cross-defendant Trans Canada Power in support of motion to quash service of summons [6-1], in support of motion to dismiss for lack of jurisdiction [6-2] (dkt clerk) (Entered: 06/03/2002)

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6/6/02 13 Minutes: Enter Order by Magistrate Judge Louisa S. Porter Judge Porter hereby recused herself from the entitled action; Case referred to Magistrate Judge Nita L. Stormes (bar) (Entered: 06/07/2002)

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6/7/02 15 Minutes: Enter Order by the clerk; pursuant to 28USC292(B) Chief Judge May M. Schroeder of the Ninth Circuit designates Judge Robert Whaley to perform duties temporarily for the Southern District of CA in this case; Case reassigned to Judge Robert H. Whaley Court Reporter: N/A (dkt clerk) (Entered: 06/10/2002)

6/10/02 16 Minutes: Enter Order by Magistrate Judge Nita L. Stormes. Case referred to Magistrate Judge Leo S. Papas Court

Reporter: N/A (dkt clerk) (Entered: 06/12/2002)

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7/10/02	21	Notice of Motion and Motion by cross-claimant Reliant Energy Svc, cross-claimant Reliant Ormond Beach, cross-claimant Reliant Etiwanda Inc, cross-claimant Reliant Ellwood, cross-claimant Reliant Mandalay Inc, cross-claimant Reliant Coolwater to dismiss master complaint [motion referred to Judge Robert H. Whaley]; motion hrg set for 08/07/02 at 9:00 (kaj) (Entered: 07/16/2002)
7/10/02	22	Declaration of Todd R. Kinnear in support of request for judicial notice re motion to dismiss master complaint [21-1] (kaj) Modified on 07/16/2002 (Entered: 07/16/2002)
7/10/02	23	Memorandum of points and authorities by cross-claimant Reliant Energy Svc, cross-claimant Reliant Ormond Beach, cross-claimant Reliant Etiwanda Inc, cross-claimant Reliant Ellwood, cross-claimant Reliant Mandalay Inc, cross-claimant Reliant Coolwater in support of motion to dismiss master complaint [21-1] (kaj) (Entered: 07/16/2002)
7/10/02	24	Request for Judicial Notice by cross-claimant Reliant Energy Svc, cross-claimant Reliant Ormond Beach, cross-claimant Reliant Etiwanda Inc, cross-claimant Reliant Ellwood, cross-claimant Reliant Mandalay Inc, cross-claimant Reliant Coolwater, motion to dismiss master complaint [21-1], motion

		to strike, motion to stay (kaj) Modified on 07/16/2002 (Entered: 07/16/2002)
7/10/02	25	Joint Notice of lodgment of individual complaints by cross-claimant Reliant Energy Svc, cross-claimant Reliant Ormond Beach, cross-claimant Reliant Etiwanda Inc, cross-claimant Reliant Ellwood, cross-claimant Reliant Mandalay Inc, cross-claimant Reliant Coolwater; motion to dismiss master complaint [21-1], motion to strike, motion to stay (kaj) Modified on 07/16/2002 (Entered: 07/16/2002)
7/10/02	26	Joint Notice of lodgment of Federal Energy Regulatory Commission Orders and other matter subject for judicial notice by cross-claimant Reliant Energy Svc, cross-claimant Reliant Ormond Beach, cross-claimant Reliant Etiwanda Inc, cross-claimant Reliant Ellwood, cross-claimant Reliant Mandalay Inc, cross-claimant Reliant Coolwater; motion to dismiss master complaint [21-1], motion to strike, and motion to stay (kaj) (Entered: 07/16/2002)
		* * * * *
7/29/02	33	JOINDER by MIECO Inc joining motion to dismiss cross-complaint (motion not on file in this case) (cag) (Entered: 07/30/2002)
		* * * * *
8/9/02	37	Opposition by Reliant Energy Svc, Reliant Ormond Beach, Reliant Etiwanda Inc, Reliant Ellwood, Reliant Mandalay Inc, Reliant Coolwater to motion to remand (cag) (Entered: 08/12/2002)

8/9/02	38	Opposition by British Columbia to motion to remand and motion to strike and/or sever crscmps (cag) (Entered: 08/12/2002)
8/9/02	39	Declaration of Kenneth G. Peterson re motion response [38-1] (cag) (Entered: 08/12/2002)
8/9/02	40	Request for Judicial Notice by British Columbia (cag) (Entered: 08/12/2002)
8/9/02	41	Declaration of Christopher P. Barry re request for judicial notice [40-1] (cag) (Entered: 08/12/2002)
8/9/02	42	Opposition by Powerex Corp to motion to remand and motion to strike and/or sever crscmps (cag) (Entered: 08/12/2002)
8/9/02	43	Declaration of Kenneth G. Peterson re motion response [42-1] (cag) (Entered: 08/12/2002)
8/9/02	44	Request for Judicial Notice by Powerex Corp (cag) (Entered: 08/12/2002)
8/9/02	45	Declaration of Christopher P. Barry re request for judicial notice [44-1] (cag) (Entered: 08/12/2002)

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8/12/02	47	Declaration of Todd R. Kinnear re motion response [37-1] (cag) (Entered: 08/13/2002)
8/12/02	48	Declaration of Joel B. Kleinman re motion response [37-1] (cag) (Entered: 08/13/2002)
8/12/02	49	Notice of lodgment by Reliant dfts re opposition to motion to remand and

		motion to strike and/or sever crscmps (cag) (Entered: 08/13/2002)
8/12/02	50	Request for Judicial Notice by Reliant dfts (cag) (Entered: 08/13/2002)
8/14/02	51	Opposition by USA, Department of Energy, Bonneville Power, Western Area Power to motion to remand and motion to strike and/or sever crscmps (cag) (Entered: 08/15/2002)
8/14/02	52	Joint Opposition by Reliant dfts to motion to dismiss crscmp (cag) (Entered: 08/15/2002)
8/14/02	53	Opposition by Reliant crscmps to motion to dismiss (cag) (Entered: 08/15/2002)
8/14/02	54	Declaration of Todd R. Kinnear re motion response [52-1] (cag) (Entered: 08/15/2002)
8/14/02	55	Request for Judicial Notice by Reliant crscmps re opposition [52-1] (cag) (Entered: 08/15/2002)
8/14/02	56	Notice of lodgment by Reliant crsclms re opposition [52-1] (cag) (Entered: 08/15/2002)
8/15/02	57	JOINDER by British Columbia joining motion to dismiss (cag) (Entered: 08/16/2002)
8/15/02	58	JOINDER by Powerex Corp joining motion to dismiss (cag) (Entered: 08/16/2002)
8/22/02	59	Notice of Motion and Motion by cross-defendant British Columbia to dismiss cross cmp [motion referred to Judge Robert H. Whaley] motion set for

		9/19/02 at 10:00 (jrl) (Entered: 08/23/2002)
8/22/02	60	Memorandum of points and authorities by cross-defendant British Columbia in support of motion to dismiss cross cmp [59-1] (jrl) (Entered: 08/23/2002)
8/22/02	61	Declaration by Christopher P. Barry for cross-defendant British Columbia re motion to dismiss cross cmp [59-1] (jrl) (Entered: 08/23/2002)
8/22/02	62	Declaration by Christopher P. Barry for cross-defendant British Columbia re motion to dismiss cross cmp [59-1] (jrl) (Entered: 08/23/2002)
8/22/02	63	Declaration by Valerie Lambert for cross-defendant British Columbia re motion to dismiss cross cmp [59-1] (jrl) (Entered: 08/23/2002)
8/22/02	64	Declaration by Kenneth Spafford for cross-defendant British Columbia re motion to dismiss cross cmp [59-1] (jrl) (Entered: 08/23/2002)
8/22/02	65	Request for Judicial Notice by cross-defendant British Columbia motion to dismiss cross cmp [59-1] (jrl) (Entered: 08/23/2002)
8/29/02	66	Notice of erratta by British Columbia; NUNC PRO TUNC to 8/27/02 (cag) (Entered: 08/29/2002)
9/3/02	67	Reply by British Columbia to opposition to motion to dismiss cross cmp [59-1] (cag) (Entered: 09/05/2002)
9/3/02	68	Declaration of Douglas M. Butz re motion reply [67-1] (cag) (Entered: 09/05/2002)

9/3/02	69	Notice of lodgment by British Columbia re reply to opposition to motion [67-1] (cag) (Entered: 09/05/2002)
9/4/02	70	Memorandum by Powerex Corp in support of suppl brief re subject matter jurisdiction; NUNC PRO TUNC to 9/3/02 (cag) (Entered: 09/05/2002)
9/4/02	71	Declaration of Douglas M. Butz re memorandum [70-1]; NUNC PRO TUNC to 9/3/02 (cag) (Entered: 09/05/2002)
9/4/02	72	Notice of lodgment by Powerex Corp re suppl brief [70-1]; NUNC PRO TUNC to 9/3/02 (cag) (Entered: 09/05/2002)
9/4/02	73	Suppl Opposition by Reliant dfts to motion to remand re foreign sovereign crsdfts (cag) (Entered: 09/06/2002)
9/4/02	74	Declaration of Nora Cregan re motion response [73-1] (cag) (Entered: 09/06/2002)
9/4/02	75	Declaration of Todd R. Kinnear re motion response [73-1] (cag) (Entered: 09/06/2002)
9/4/02	76	Notice of lodgment by Reliant dfts re opposition [73-1] (cag) (Entered: 09/06/2002)
9/10/02	77	Minutes of hrg on 9/4/02: Enter Order by Judge Robert H. Whaley; ct to prepare order. Court Reporter: Debra Clark (cag) (Entered: 09/11/2002)

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9/16/02	79	Objs and Motion by Reliant dfts to strike portions of decls of Kenneth Spafford and Valerie Lambert re motion to

dismiss; [motion referred to Judge Robert H. Whaley]; motion hrg set for 9/19/02 at 10:00; NUNC PRO TUNC to 9/6/02 (cag) (Entered: 09/17/2002)

9/16/02 80 Amd Exhibit B filed as to decl of John Pespisa (filed in 02cv990); NUNC PRO TUNC to 9/9/02 (cag) (Entered: 09/17/2002)

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9/16/02 82 Reply by British Columbia to opposition to motion to dismiss cross cmp [59-1]; NUNC PRO TUNC to 9/13/02 (cag) (Entered: 09/17/2002)

9/16/02 83 Declaration of Douglas M. Butz re motion reply [82-1]; NUNC PRO TUNC to 9/13/02 (cag) (Entered: 09/17/2002)

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9/16/02 85 Opposition by British Columbia to motion to strike portions of decls of Kenneth Spafford and Valerie Lambert re motion to dismiss [79-1]; NUNC PRO TUNC to 9/13/02 (cag) (Entered: 09/17/2002)

9/16/02 86 Opposition by Reliant dfts to motion to dismiss cross cmp [59-1] (cag) (Entered: 09/17/2002)

9/16/02 87 Declaration of Todd R. Kinnear re motion response [86-1] (cag) (Entered: 09/17/2002)

9/16/02 88 Declaration of John Pespisa re motion response [86-1] (cag) (Entered: 09/17/2002)

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9/17/02	90	Ex Parte Application by Reliant dfts for leave to file 2nd suppl brief in opposition to motion to remand and motion to dismiss (cag) (Entered: 09/19/2002)
9/17/02	91	Notice of filing by Reliant dfts of material under seal (cag) (Entered: 09/19/2002)

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9/18/02	96	Sealed 2nd suppl brief in opposition to motion to remand and motion to dismiss (pursuant to Court Order) (cag) (Entered: 09/19/2002)
9/18/02	97	Sealed decl of Todd R. Kinnear (pursuant to Court Order) re [96-1] (cag) (Entered: 09/19/2002)
9/18/02	98	Sealed notice of lodgment (pursuant to Court Order) re [96-1] (cag) (Entered: 09/19/2002)
9/18/02	99	Objections by British Columbia to [96-1] (cag) (Entered: 09/19/2002)

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10/18/02	105	Order by Judge Robert H. Whaley granting ex parte application for leave to file 2nd suppl brief in opposition to motion to remand and motion to dismiss [90-1]; crsdfts BC Hydro and Powerex shall have 10 days from date of this order to file 2nd suppl brief (cag) (Entered: 10/21/2002)
10/28/02	106	Minutes: Enter Order recusing all Mag Judges for SDCA; Case referred to case Unassigned (cag) (Entered: 10/28/2002)
10/29/02	107	Reply by Reliant Energy Svc, Reliant Ormond Beach, Reliant Etiwanda Inc,

		Reliant Ellwood, Reliant Mandalay Inc, Reliant Coolwater to opposition to motion to dismiss master complaint [21-1] (cag) (Entered: 10/30/2002)
10/29/02	108	Declaration of Reliant dfts re motion reply [107-1] (cag) (Entered: 10/30/2002)
10/29/02	109	Request for Judicial Notice by Reliant dfts re motion reply 107 (cag) (Entered: 10/30/2002)
10/29/02	110	Notice of lodgment by Reliant dfts re motion reply 107 (cag) (Entered: 10/30/2002)
11/4/02	111	Document Sealed (pursuant to Court Order) (ksr) (Entered: 11/05/2002)
11/4/02	112	Document Sealed (pursuant to Court Order) (ksr) (Entered: 11/05/2002)
11/4/02	113	Document Sealed (pursuant to Court Order) (ksr) (Entered: 11/05/2002)
11/4/02	114	Document Sealed (pursuant to Court Order) (ksr) (Entered: 11/05/2002)

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12/16/02	120	Ex Parte Application of Duke Energy and Reliant Energy dfts for stay of remand pending resolution of appeal, ruling on pending appl for service order (cag) (Entered: 12/17/2002)
12/16/02	122	Notice of appeal by cross-claimant Reliant Energy Svc, cross-claimant Reliant Ormond Beach, cross-claimant Reliant Etiwanda Inc, cross-claimant Reliant Ellwood, cross-claimant Reliant Mandalay Inc, cross-claimant Reliant Coolwater from Dist. Court decision entered on 12/17/02. Receipt No/Amt of Fee: Not

		Paid [121-2] (dkt clerk) Modified on 01/30/2006 (Entered: 12/18/2002)
12/17/02	121	Order by Judge Robert H. Whaley granting plas' motion to remand, motion to strike and motion to sever cross-complaints; remanding case to state court (per req of ct, order not sent to state ct until appl to stay remand heard) (cag) (Entered: 12/17/2002)
12/17/02	123	Ex Parte Application by Powerex Corp for stay of remand pending resolution of appeal to 9th circuit (cag) (Entered: 12/18/2002)
12/18/02		Notice of appeal sent to Circuit Court [122-1] (dkt clerk) (Entered: 12/18/2002)
		* * * * *
12/18/02	148	Notice of appeal by defendant Duke Energy Trading from Dist. Court decision entered on 12/17/02. Receipt No/Amt of Fee: $150.00 [121-2], t/w Representation Statement (dkt clerk) Modified on 01/30/2006 (Entered: 02/07/2003)
		* * * * *
12/30/02	126	Notification by Circuit Court of Appellate Docket Number [122-1] 02-57200 (dkt clerk) (Entered: 12/31/2002)
		* * * * *
1/7/03	130	Motion by USA for clarification; [motion referred to Judge Robert H. Whaley] (cag) (Entered: 01/09/2003)
1/10/03	131	Notice of Motion and Motion by Powerex Corp for reconsideration; [motion referred to Judge Robert H. Whaley] (cag) (Entered: 01/14/2003)

1/10/03	132	Memorandum of points and authorities by Powerex Corp in support of motion for reconsideration [131-1] (cag) (Entered: 01/14/2003)
1/10/03	133	LR 7.1(i) Certified Statement by Powerex Corp re motion for reconsideration [131-1] (cag) (Entered: 01/14/2003)
1/13/03	134	Reply by Powerex Corp re appl for stay of remand [123-1] (cag) (Entered: 01/14/2003)
1/13/03	135	Reply by Duke Energy and Reliant Entity dfts re appl for stay of remand [120-1] (cag) (Entered: 01/14/2003)
1/13/03	136	Declaration of John T. Brooks re application for stay of remand [120-1] (cag) (Entered: 01/14/2003)

* * * * *

1/13/03	138	Notice of appeal by cross-defendant Powerex Corp from Dist. Court decision entered on 12/17/02. Receipt No/Amt of Fee: $105.00, 90331 [121-2] (dkt clerk) Modified on 01/30/2006 (Entered: 01/14/2003)

* * * * *

1/27/03	141	Order by Judge Robert H. Whaley denying ex parte application to stay remand [120-1], denying ex parte application to stay remand [123-1], re motion for reconsideration [131-1]: opposition to motion due by 1/31/03, reply to opposition to motion due by 2/5/03, motion hearing set for 2/7/03 Judge Robert Whaley w/o oral argument (cag) (Entered: 01/27/2003)

* * * * *

2/3/03	143	Order by Judge Robert H. Whaley denying motion for clarification [130-1] (cag) (Entered: 02/03/2003)
2/3/03	144	Notification by Circuit Court of Appellate Docket Number [138-1] 03-55176 (dkt clerk) (Entered: 02/03/2003)

* * * * *

2/5/03	147	Reply by Powerex Corp to opposition to motion for reconsideration [131-1] (cag) (Entered: 02/06/2003)
2/7/03		Notice of appeal sent to Circuit Court [148-1] (dkt clerk) (Entered: 02/07/2003)
2/13/03	151	Notification by Circuit Court of Appellate Docket Number [138-1] 03-55249 (dkt clerk) Modified on 02/14/2003 (Entered: 02/14/2003)

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2/14/03	153	Notice of appeal by cross-defendant USA, cross-defendant Department of Energy, cross-defendant Bonneville Power, cross-defendant Western Area Power from Dist. Court decision entered on 12/17/02. [121-2]; no fee required (dkt clerk) Modified on 01/30/2006 (Entered: 02/18/2003)
2/18/03		Notice of appeal sent to Circuit Court [153-1] (dkt clerk) (Entered: 02/18/2003)

* * * * *

2/24/03		Transcript of motion hrg on 1/23/03 before Judge Whaley filed (original in 02cv990) (cag) (Entered: 02/25/2003)
2/26/03	155	Notification by Circuit Court of Appellate Docket Number [153-1] 03-55322 (dkt clerk) (Entered: 02/26/2003)

* * * * *

5/27/03	157	Copy of Appellate Court Order Staying the proceedings for 120 days as to NRG; the briefing schedule remains in place as to the remainder of the parties (dkt clerk) (Entered: 05/28/2003)
9/2/03	158	Copy of Appellate Court Order referring the 6/25/03 motion to intervene or for leave to file an Amici Curiae is referred to panel assigned to hear the merits of these consolidated appeals (dkt clerk) (Entered: 09/03/2003)

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1/16/04	161	Stipulation to dismiss cross cmp against Salt River Project and Order thereon by Judge Robert H. Whaley; terminating party Salt River Project (cag) (Entered: 01/16/2004)
1/21/04	162	Order by Judge Robert H. Whaley denying as moot motion for reconsideration [131-1] w/ leave to renew (cag) (Entered: 01/21/2004)

* * * * *

3/14/05		Received judgement from USCA. Forwarded copy to Court Clerk for calendar. (affirmed in part/vacated and remanded) (dkt clerk) (Entered: 03/22/2005)
5/11/05	166	Order by Judge Robert H. Whaley terminating dfts Western Area Power, Bonneville Power pursuant to 9th Circuit order (cag) (Entered: 05/12/2005)
6/27/06	167	Certified copy of judgment from USCA affirming the appeal is entered and filed. (dkt clerk) (Entered: 06/27/2006)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55118

DUKE ENERGY TRADING AND MARKETING, LLC, ET AL.,
Cross-claimants – Appellees,

v.

POWEREX CORP., ET AL.,
Cross-defendants – Appellants.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
1/22/03	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): NO. * * * * * [03-55118] (mhf) [03-55118]
	* * * * *
2/6/03	Filed Appellant Powerex Corp.'s emergency motion under Circuit Rule 27-3 for consolidation of appeals (02-57200, 02-57202, 02-57210, 03-55118, 03-55131, 03-55176) and establishment of deadline for response to show cause order, corporate disclosure statement for appellant Powerex Corp., served on 2/6/03 (to MOATT) [03-55118] (ru) [03-55118]
	* * * * *
2/20/03	Filed order (Ferdinand F. FERNANDEZ, Ronald M. GOULD): The court sua sponte

consolidates these appeals. To better structure these proceedings, the court has designated Reliant Energy Services, Inc., and Duke Energy Trading and Marketing, LLC, et al., as appellants/cross-appellees. Powerex Corp., et al. has been designated as appellees/cross-appellants. The clerk shall amend the docket to reflect the above caption for these appeals. The court has received and reviewed aplts' response to this court's 1/28/03 order to show cause in no. 02-57202. We conclude that the court has jurisdiction to entertain the appeals from the DC's 12/13/02 remand order . . . Accordingly, the order to show cause is DISCHARGED. Aplts' 2/7/03 emergency motion to stay the DC's remand order pending this court's ruling on the order to show cause is DENIED as moot. However, the court sua sponte GRANTS a stay of the DC's remand order pending these appeals. All prevsly established briefing schedules are VACATED. The following briefing schedule shall govern these consolidated appeals. * * * * * (PARTIES FAXED/MOATT) [02-57200 [*et al.*]] (hh) [02-57200 [*et al.*]]

* * * * *

3/6/03 Filed plaintiff-appellees' motion for reconsideration of 2/20/03 order discharging order to show cause and staying remand pending appeal; served on 3/6/03 (to MOATT) [02-57200 [*et al.*]] (hh) [02-57200 [*et al.*]]

3/7/03 Filed order MOATT (JM) The court sua sponte consolidated these appeals to better structure these proceedings, in addition to Powerex Corp., the court designates Bonneville Power Administration and Western

Power Administration as appellees/cross-appellants. The briefing schedule established in the court's 2/20/03 order filed in lead no. 02-57200 shall apply to these consolidated appeals. The clerk shall amend the docket to reflect the above caption for these appeals. [02-57200 [*et al.*]] (hh) [02-57200 [*et al.*]]

* * * * *

6/16/03 Received original and 15 copies Reliant Energy Serv, Reliant Ormond Beach, Reliant Energy Etiwa, Reliant Energy Ellw, Reliant Energy Manda, Reliant Energy Cool, Duke Energy Trading, Duke Energy Morro, Duke Energy Moss, Duke Energy South, Duke Energy Oakland 1st cross-appeal brief, (Informal: NO) of 67 pages, with 4 excerpts of record, served on 6/16/03 deficient: Motion to seal the 1st brief is PENDING. Notified counsel. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

6/16/03 From Aplts Reliant Energy Serv Reliant Ormond Beach, Reliant Energy Etiwa, Reliant Energy Ellw, Reliant Energy Manda, Reliant Energy Cool, Aples Duke Energy Trading, Duke Energy Morro, Duke Energy Moss, Duke Energy South, Duke Energy Oakland, received notification to seal opening brief of aplt/cross aples and volume IV of Excerpts of Record served on 6/16/03. CASEFILE (ji) [02-57200 [*et al.*]]

6/16/03 Filed original and 15 copies UNDER SEAL (BRIEF AND VOL 4 EOR) Reliant Energy Serv, Reliant Ormond Beach, Reliant Energy Etiwa, Reliant Energy Ellw, Reliant Energy Manda, Reliant Energy Cool, Duke Energy Trading, Duke Energy Morro, Duke

Energy Moss, Duke Energy South, Duke Energy Oakland, brief on cross-appeal (Informal: NO) of 67 pages and 5 copies of excerpts of record in 4 vols; served on 6/16/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

* * * * *

6/27/03 Received orig. and 15 copies Arizona Electric's brief 28 pages deficient: Motion to file MOATT. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

* * * * *

7/28/03 Filed Under Seal original and 15 copies appellee British Columbia Hyd's 49 pages brief, & 5 copies of Vol 2 Exc., 2 vols Excerpts of record; served on 7/28/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

7/28/03 Filed original and 15 copies Powerex Corp second brief on cross-appeal (Informal: NO) of 38 pages and 5 copies excerpts of record in 5 vols; served on 7/28/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

7/28/03 Filed original and 15 copies Bonneville Power Ad, Western Area Pow Ad second brief on cross-appeal (Informal: NO) of 24 pages and 0 excerpts of record; (minor defcy: All consolidated cases number be listed on the cover sheet.); served on 7/25/03 [dktd in combination with consolidated cases 02-57200 [*et al.*]] [03-55118] (cu) [03-55118]

8/6/03 Rec'd notice of errata and corrected pages to opening brief from Appellee Powerex Corp, served 8/5/03 (RECORDS) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

8/6/03 Rec'd notice of errata and corrected pages to ans brief from Appellee British Columbia

Hyd and Power Authority Filed Under Seal, served 8/5/03 (RECORDS) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

* * * * *

9/5/03 Filed order (Ferdinand F. FERNANDEZ, Ronald M. GOULD): Aples' motion for recon of the court's 2/20/03 order is DENIED. CITE. Aples' motion for an ext of time to file an answering brf is GRANTED. * * * * * [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

* * * * *

10/15/03 Filed original and 15 copies aples People of the State, Ruth Hendrick, Cruz M. Bustamante, Barbara Matthews, Sweetwater Authority, Pamela R. Gordon's 46 pages brief, 1 Exc. vol; served on 10/14/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

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12/4/03 Filed original and 15 copies Reliant Energy Serv in 02-57200, Reliant Ormond Beach in 02-57200, Reliant Energy Etiwa in 02-57200, Reliant Energy Ellw in 02-57200, Reliant Energy Manda in 02-57200, Reliant Energy Cool in 02-57200, Duke Energy Trading in 03-55118, Duke Energy Morro in 03-55118, Duke Energy Moss in 03-55118, Duke Energy South in 03-55118, Duke Energy Oakland in 03-55118 third brief on cross-appeal (Informal: NO) of 35 pages and 5 copies 0 excerpts of record; (minor defcy: Incorrect color covers.); served on 12/4/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

* * * * *

12/18/03 Received orig. and 15 copies British Columbia Hydro and Power Authority reply brief

(Informal: NO) of 18 pages; with supplemental excerpts of record in 1 volume; served on 2/18/03 (deficient: Aple is not part of cross appeal). Notified counsel. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

12/18/03 Filed original and 15 copies aples/cross aplts Bonneville Power Admin and Western Area Power Admin reply brief, (Informal: NO) of 10 pages; served on 12/17/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

12/18/03 Filed original and 15 copies aple/cross aplt Powerex Corp reply brief, (Informal: NO) of 27 pages; with excerpts in 1 volume; served on 12/18/03 (minor defcy: Incorrect color covers) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

12/18/03 Filed original and 15 copies British Columbia Hydro and Power Authority reply brief, (Informal: NO) 18 pages; supplemental excerpts in 1 vol; served on 12/18/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

* * * * *

3/5/04 Filed Arizona Electric additional citations, served on 3/5/04 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

3/18/04 Filed aplts/cross-aples Reliant and Duke additional citations, served on 3/17/04 (RECORDS) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

3/23/04 Filed order (Mary M. SCHROEDER, Johnnie B. RAWLINSON): Nos. 03-74526 and 03-74730 were consolidated with no. 01-71051, et al. Nos. 03-74252, 03-74415, 03-74526, 03-74527, 03-74531, 03-74547, 03-74548, 03-74550, 03-74582, 03-74590,

03-74592, 03-74604, 03-74629, 03-74631, 03-74647, 03-74653, 03-74654, 03-74655, 04-70564 and 04-70637 are consolidated with no. 01-71051, et al. Pursuant to the provisions of the Aug. 21, 2002 order, any entity granted leave to intvn in one case is deemed to have been granted leave to intvn in all of the consolidated cases. Accordingly, the mtns of Enron Mrktng, Duke Energy, Merrill Lynch, Portland G.E.Co., Mirant Americas, Reliant Energy Power Generation, et al., Port of Seattle, Avista Corp., et al., L.A. Dept of Water and Power, CA Electricity Oversight Board, Pinnacle West Capital Corp., et al., Sempra Energy Trading Co., Williams Power Co., CA ISO, Northern CA Transmission Agency, So.CA Edison, PacifiCorp, City of Santa Clara, et al., and the TransCanada Energy, Ltd., for leave to intvn are denied as unnecessary. The mtns of the People of the State of CA to intvn in No. 03-74252, 03-74527, 03-74531, 03-74547, 03-74548, 03-74550, 03-74582, 03-74590, 03-74592, 03-74604, 03-74629, 03-74631, 03-74647, 03-74653, 03-74654, 03-74655, 03-74730 and the PUC to intvn in nos. 03-74527, 03-74531, 03-74582, 03-74547, 03-74548, 03-74550, 03-74590, 03-74592, 03-74604, 03-74629, 03-74631, 03-74653, 03-74654, 03-74655 and 03-74730 are granted. The mtn of the People of the State of CA for leave to intvn in NO. 04-70564 is denied in view of the consolidation of no. 04-70564 and 04-70637. The mtn of Coral Power for leave to file a late mtn to intvn is granted. In view of the consolidation of nos. 03-74252, 03-74523, 03-74531, 03-74548, 03-74582, 03-74654, 03-74415, 03-74526, 03-74527, 03-74531, 03-74547,

03-74548, 03-74647, 03-74582, 03-74590, 03-74592, 03-74604, 03-74629, 03-74647, 03-74653, 03-74654, 03-74655 and 03-74730, the mtn of the following entities to intvn in other petitions challenging the same rmd proceedings are denied as unnecessary; Morgan Stanley, Tucson Electric Power Co., PG&E, El Paso Merchant Energy, Puget Sound Energy, Inc., Modesto Irrigation District, et al., Constellation Power, City of Vernon and Powerex. If any petitioner wishes to additionally participate as an intvnr in any of the cases consolidated by this order, it may file a renewed mtn upon the lifting of the stay. The renewed mtn shall state with specificity why movant's interests will not be addressed by another pty. (cite) Any renewed mtn shall also state movant's agreement to: (1) limit the combined length of the opening and intrvnr brief to 14,000 words, and (2) waive the filing of the reply brief. The mtns of Tucson Electric, et al., for leave to intvn in nos. 03-74647, 04-70564 and 04-70637 and PG&E and Powerex to intvn in no. 04-70564 are granted. However, the arguments offered as intvnrs must be included in the petitioners' briefs. In view of the provisions of the March 12, 2004 order staying proceedings, the mtns of IdaCorp, Salt River Project, Constellation Power, State Water Contractors, Tucson Electric, Automated Power Exchange, Morgan Stanley, Energy Plus, El Paso Merchant, City of Seattle, Portland G.E., Modesto Irrigation District, Powerex, PPL Energy Plus, and Sacramento Municipal to vacate the schedule are denied as moot. Within 14 days from the date of this order, Powerex Corp. shall tender the remainder of

the dkt fee. Failure to satisfy the fee requirement will result in the dismissal of no. 03-74547 w/o further ntc. [re-dktd by je to include consolidated cases] [01-71051 [*et al.*]] (je) [01-71051 [*et al.*]]

* * * * *

3/25/04 Filed order (Deputy Clerk: gss/promo): The court is in receipt of NRG Energy's bankruptcy status report which states that NRG Energy has emerged from bankrupcy. On or before 4/23/04, NRG Energy shall file their answering brf, a ntc of joinder in another aples' brf pursuant to Ninth Cir.R. 28-4, or if aple NRG Energy does not elect to file a brf, aple NRG Energy shall notify the court by ltr on or before the due date of the ans brf pursuant to Ninth Cir.R. 31-2.3. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

3/31/04 Received Timothy B Taylor for NRG Energy Inc letter dated 3/29/04 re: NRG Energy will not be filing a brief. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

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5/12/04 Filed aples additional citations, served on 5/12/04 (panel) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

5/13/04 Filed order (Deputy Clerk: hh) The mtn of cross-defs Arizona Electric Power Cooperative, Inc. et al. to appear as cross-aplts is granted in part. Movants may appear as cross-aplts for the limited purpose of having their proffered brf filed. The brf accompanying Movant's motion is ordered filed. Aplts Reliant Energy, et al. may file a responsive brf by 5/28/04. (phone/fax) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

6/14/04 ARGUED AND SUBMITTED TO Mary M. SCHROEDER, William C. CANBY, Richard C. TALLMAN [02-57200 [*et al.*]] (ea) [02-57200 [*et al.*]]

* * * * *

12/8/04 FILED OPINION: AFFIRMED IN PART; VACATED IN PART and REMANDED. Costs are awarded to BPA, WAPA, and BC Hydro and against PowerEx. (Terminated on the Merits after Oral Hearing; Affirmed in part; Vacated in part and Remanded; Written, Signed, Published. Mary M. SCHROEDER, author; William C. CANBY; Richard C. TALLMAN. FILED AND ENTERED JUDGMENT. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

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1/26/05 Filed order (Mary M. SCHROEDER): The mtn of x-aplt Powerex' mtn for an ext of time to file a petn for rhrg and sugg for rhrg en banc is granted. Aple/x-aplt is granted an ext of 7 days from the date of this order within which to file a petn for rhrg and sugg for rhrg en banc. [02-57200 [*et al.*]] (crw) [02-57200 [*et al.*]]

2/2/05 Filed original and 50 copies Appellee/cross aplt Powerex Corp petition for panel rehearing and petition for rehearing en banc 20 pages, served on 2/1/05 (panel and active judges) (ji) [02-57200 [*et al.*]]

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3/3/05 Filed order (Mary M. SCHROEDER, William C. CANBY, Richard C. TALLMAN): . . . The petition for panel rehearing and the

petition for rehearing en banc are denied. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

3/11/05 MANDATE ISSUED. Costs taxed against appellants Reliant and Duke for $3617.10. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

3/16/05 Filed aple/x-aplt Powerex Corp motion to recall the mandate. served on 3/15/05 [panel] (ji) [02-57200 [*et al.*]]

* * * * *

3/25/05 Filed aples opposition to aple/x-aplt Powerex Corp to recall mdt. served on 3/25/05 PANEL [02-57200 [*et al.*]] (crw) [02-57200 [*et al.*]]

4/6/05 Filed order (Mary M. SCHROEDER): Aple/cross aplt, Powerex Corp.'s mtn to recall the mandate is denied. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

6/1/05 Received letter from the Supreme Court dated 5/23/05 re: ext time within to file a petition for a writ of certiorari. Time extended until 7/1/05. (CASEFILE) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

6/27/05 Received letter from the Supreme Court dated 6/22/05 re: granting further ext of time to file cert to 7/15/05. casefile. [02-57200 [*et al.*]] (crw) [02-57200 [*et al.*]]

7/22/05 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 5-85 filed on 7/15/05. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

1/26/07 Received letter from the Supreme Court dated 1/19/07 re: granting the mtn Government of Canada for leave to file a brf as amicus curiae; the petition for a writ of cert is granted lmt to question 1 presented by the

petition and parties are directed to brf and argue the following question: Whether the court of appeal had jurisdiction to review the district court's remand order, notwithstanding 28 USC Sec. 1447(d). [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55131

RELIANT ENERGY SERVICES, INC., ET AL.,
Cross-claimants – Appellees,

v.

POWEREX CORP., ET AL.,
Cross-defendants – Appellants.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
1/22/03	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): no. * * * * * [03-55131] (dg) [03-55131]
	* * * * *
2/20/03	Filed order (Ferdinand F. FERNANDEZ, Ronald M. GOULD): The court sua sponte consolidates these appeals. To better structure these proceedings, the court has designated Reliant Energy Services, Inc., and Duke Energy Trading and Marketing, LLC, et al., as appellants/cross-appellees. Powerex Corp., et al. has been designated as appellees/cross-appellants. The clerk shall amend the docket to reflect the above caption for these appeals. The court has received and reviewed aplts' response to this court's 1/28/03 order to show cause in no. 02-57202. We conclude that the court has

jurisdiction to entertain the appeals from the DC's 12/13/02 remand order . . . Accordingly, the order to show cause is DISCHARGED. Aplts' 2/7/03 emergency motion to stay the DC's remand order pending this court's ruling on the order to show cause is DENIED as moot. However, the court sua sponte GRANTS a stay of the DC's remand order pending these appeals. All prevsly established briefing schedules are VACATED. The following briefing schedule shall govern these consolidated appeals. * * * * * (PARTIES FAXED/MOATT) [02-57200 [*et al.*]] (hh) [02-57200 [*et al.*]]

* * * * *

3/6/03 Filed plaintiff-appellees' motion for reconsideration of 2/20/03 order discharging order to show cause and staying remand pending appeal; served on 3/6/03 (to MOATT) [02-57200 [*et al.*]] (hh) [02-57200 [*et al.*]]

3/7/03 Filed order MOATT (JM) The court sua sponte consolidated these appeals to better structure these proceedings, in addition to Powerex Corp., the court designates Bonneville Power Administration and Western Power Administration as appellees/cross-appellants. The briefing schedule established in the court's 2/20/03 order filed in lead no. 02-57200 shall apply to these consolidated appeals. The clerk shall amend the docket to reflect the above caption for these appeals. [02-57200 [*et al.*]] (hh) [02-57200 [*et al.*]]

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6/16/03 Received original and 15 copies Reliant Energy Serv, Reliant Ormond Beach, Reliant

Energy Etiwa, Reliant Energy Ellw, Reliant Energy Manda, Reliant Energy Cool, Duke Energy Trading, Duke Energy Morro, Duke Energy Moss, Duke Energy South, Duke Energy Oakland 1st cross-appeal brief, (Informal: NO) of 67 pages, with 4 excerpts of record, served on 6/16/03 deficient: Motion to seal the 1st brief is PENDING. Notified counsel. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

6/16/03 From Aplts Reliant Energy Serv Reliant Ormond Beach, Reliant Energy Etiwa, Reliant Energy Ellw, Reliant Energy Manda, Reliant Energy Cool, Aples Duke Energy Trading, Duke Energy Morro, Duke Energy Moss, Duke Energy South, Duke Energy Oakland, received notification to seal opening brief of aplt/cross aples and volume IV of Excerpts of Record served on 6/16/03. CASEFILE (ji) [02-57200 [*et al.*]]

6/16/03 Filed original and 15 copies UNDER SEAL (BRIEF AND VOL 4 EOR) Reliant Energy Serv, Reliant Ormond Beach, Reliant Energy Etiwa, Reliant Energy Ellw, Reliant Energy Manda, Reliant Energy Cool, Duke Energy Trading, Duke Energy Morro, Duke Energy Moss, Duke Energy South, Duke Energy Oakland, brief on cross-appeal (Informal: NO) of 67 pages and 5 copies of excerpts of record in 4 vols; served on 6/16/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

* * * * *

6/27/03 Received orig. and 15 copies Arizona Electric's brief 28 pages deficient: Motion to file MOATT. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

* * * * *

7/28/03 Filed original and 15 copies Bonneville Power Ad, Western Area Pow Ad second brief on cross-appeal (Informal: NO) of 24 pages and 0 excerpts of record; (minor defcy: All consolidated cases number be listed on the cover sheet.); served on 7/25/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

* * * * *

7/28/03 Filed Under Seal original and 15 copies appellee British Columbia Hyd's 49 pages brief, & 5 copies of Vol 2 Exc., 2 vols Excerpts of record; served on 7/28/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

7/28/03 Filed original and 15 copies Powerex Corp second brief on cross-appeal (Informal: NO) of 38 pages and 5 copies excerpts of record in 5 vols; served on 7/28/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

8/6/03 Rec'd notice of errata and corrected pages to opening brief from Appellee Powerex Corp, served 8/5/03 (RECORDS) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

8/6/03 Rec'd notice of errata and corrected pages to ans brief from Appellee British Columbia Hyd and Power Authority Filed Under Seal, served 8/5/03 (RECORDS) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

* * * * *

9/5/03 Filed order (Ferdinand F. FERNANDEZ, Ronald M. GOULD): Aples' motion for recon of the court's 2/20/03 order is DENIED. CITE. Aples' motion for an ext of time to file an answering brf is GRANTED. * * * * * [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

* * * * *

10/15/03 Filed original and 15 copies aples People of the State, Ruth Hendrick, Cruz M. Bustamante, Barbara Matthews, Sweetwater Authority, Pamela R. Gordon's 46 pages brief, 1 Exc. vol; served on 10/14/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

* * * * *

12/4/03 Filed original and 15 copies Reliant Energy Serv in 02-57200, Reliant Ormond Beach in 02-57200, Reliant Energy Etiwa in 02-57200, Reliant Energy Ellw in 02-57200, Reliant Energy Manda in 02-57200, Reliant Energy Cool in 02-57200, Duke Energy Trading in 03-55118, Duke Energy Morro in 03-55118, Duke Energy Moss in 03-55118, Duke Energy South in 03-55118, Duke Energy Oakland in 03-55118 third brief on cross-appeal (Informal: NO) of 35 pages and 5 copies 0 excerpts of record; (minor defcy: Incorrect color covers.); served on 12/4/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

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12/18/03 Received orig. and 15 copies British Columbia Hydro and Power Authority reply brief (Informal: NO) of 18 pages; with supplemental excerpts of record in 1 volume; served on 2/18/03 (deficient: Aple is not part of cross appeal). Notified counsel. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

12/18/03 Filed original and 15 copies aples/cross aplts Bonneville Power Admin and Western Area Power Admin reply brief, (Informal: NO) of 10 pages; served on 12/17/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

12/18/03 Filed original and 15 copies aple/cross aplt Powerex Corp reply brief, (Informal: NO) of 27 pages; with excerpts in 1 volume; served on 12/18/03 (minor defcy: Incorrect color covers) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

12/18/03 Filed original and 15 copies British Columbia Hydro and Power Authority reply brief, (Informal: NO) 18 pages; supplemental excerpts in 1 vol; served on 12/18/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

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3/5/04 Filed Arizona Electric additional citations, served on 3/5/04 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

3/18/04 Filed aplts/cross-aples Reliant and Duke additional citations, served on 3/17/04 (RECORDS) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

3/23/04 Filed order (Mary M. SCHROEDER, Johnnie B. RAWLINSON): Nos. 03-74526 and 03-74730 were consolidated with no. 01-71051, et al. Nos. 03-74252, 03-74415, 03-74526, 03-74527, 03-74531, 03-74547, 03-74548, 03-74550, 03-74582, 03-74590, 03-74592, 03-74604, 03-74629, 03-74631, 03-74647, 03-74653, 03-74654, 03-74655, 04-70564 and 04-70637 are consolidated with no. 01-71051, et al. Pursuant to the provisions of the Aug. 21, 2002 order, any entity granted leave to intvn in one case is deemed to have been granted leave to intvn in all of the consolidated cases. Accordingly, the mtns of Enron Mrktng, Duke Energy, Merrill Lynch, Portland G.E.Co., Mirant Americas, Reliant Energy Power Genera-

tion, et al., Port of Seattle, Avista Corp., et al., L.A. Dept of Water and Power, CA Electricity Oversight Board, Pinnacle West Capital Corp., et al., Sempra Energy Trading Co., Williams Power Co., CA ISO, Northern CA Transmission Agency, So.CA Edison, PacifiCorp, City of Santa Clara, et al., and the TransCanada Energy, Ltd., for leave to intvn are denied as unnecessary. The mtns of the People of the State of CA to intvn in No. 03-74252, 03-74527, 03-74531, 03-74547, 03-74548, 03-74550, 03-74582, 03-74590, 03-74592, 03-74604, 03-74629, 03-74631, 03-74647, 03-74653, 03-74654, 03-74655, 03-74730 and the PUC to intvn in nos. 03-74527, 03-74531, 03-74582, 03-74547, 03-74548, 03-74550, 03-74590, 03-74592, 03-74604, 03-74629, 03-74631, 03-74653, 03-74654, 03-74655 and 03-74730 are granted. The mtn of the People of the State of CA for leave to intvn in NO. 04-70564 is denied in view of the consolidation of no. 04-70564 and 04-70637. The mtn of Coral Power for leave to file a late mtn to intvn is granted. In view of the consolidation of nos. 03-74252, 03-74523, 03-74531, 03-74548, 03-74582, 03-74654, 03-74415, 03-74526, 03-74527, 03-74531, 03-74547, 03-74548, 03-74647, 03-74582, 03-74590, 03-74592, 03-74604, 03-74629, 03-74647, 03-74653, 03-74654, 03-74655 and 03-74730, the mtn of the following entities to intvn in other petitions challenging the same rmd proceedings are denied as unnecessary; Morgan Stanley, Tucson Electric Power Co., PG&E, El Paso Merchant Energy, Puget Sound Energy, Inc., Modesto Irrigation District, et al., Constellation Power, City of Vernon and Powerex. If any petitioner

wishes to additionally participate as an intvnr in any of the cases consolidated by this order, it may file a renewed mtn upon the lifting of the stay. The renewed mtn shall state with specificity why movant's interests will not be addressed by another pty. (cite) Any renewed mtn shall also state movant's agreement to: (1) limit the combined length of the opening and intrvnr brief to 14,000 words, and (2) waive the filing of the reply brief. The mtns of Tucson Electric, et al., for leave to intvn in nos. 03-74647, 04-70564 and 04-70637 and PG&E and Powerex to intvn in no. 04-70564 are granted. However, the arguments offered as intvnrs must be included in the petitioners' briefs. In view of the provisions of the March 12, 2004 order staying proceedings, the mtns of IdaCorp, Salt River Project, Constellation Power, State Water Contractors, Tucson Electric, Automated Power Exchange, Morgan Stanley, Energy Plus, El Paso Merchant, City of Seattle, Portland G.E., Modesto Irrigation District, Powerex, PPL Energy Plus, and Sacramento Municipal to vacate the schedule are denied as moot. Within 14 days from the date of this order, Powerex Corp. shall tender the remainder of the dkt fee. Failure to satisfy the fee requirement will result in the dismissal of no. 03-74547 w/o further ntc. [re-dktd by jc to include consolidated cases] [01-71051 [*et al.*]] (je) [01-71051 [*et al.*]]

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3/25/04 Filed order (Deputy Clerk: gss/promo): The court is in receipt of NRG Energy's bankruptcy status report which states that NRG Energy has emerged from bankrupcy. On or

before 4/23/04, NRG Energy shall file their answering brf, a ntc of joinder in another aples' brf pursuant to Ninth Cir.R. 28-4, or if aple NRG Energy does not elect to file a brf, aple NRG Energy shall notify the court by ltr on or before the due date of the ans brf pursuant to Ninth Cir.R. 31-2.3. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

3/31/04 Received Timothy B Taylor for NRG Energy Inc letter dated 3/29/04 re: NRG Energy will not be filing a brief. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

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5/12/04 Filed aples additional citations, served on 5/12/04 (panel) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

5/13/04 Filed order (Deputy Clerk: hh) The mtn of cross-defs Arizona Electric Power Cooperative, Inc. et al. to appear as cross-aplts is granted in part. Movants may appear as cross-aplts for the limited purpose of having their proffered brf filed. The brf accompanying Movant's motion is ordered filed. Aplts Reliant Energy, et al. may file a responsive brf by 5/28/04. (phone/fax) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

6/14/04 ARGUED AND SUBMITTED TO Mary M. SCHROEDER, William C. CANBY, Richard C. TALLMAN [02-57200 [*et al.*]] (ca) [02-57200 [*et al.*]]

* * * * *

12/8/04 FILED OPINION: AFFIRMED IN PART; VACATED IN PART and REMANDED. Costs are awarded to BPA, WAPA, and BC Hydro and against PowerEx. (Terminated

on the Merits after Oral Hearing; Affirmed in part; Vacated in part and Remanded; Written, Signed, Published. Mary M. SCHROEDER, author; William C. CANBY; Richard C. TALLMAN. FILED AND ENTERED JUDGMENT. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

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1/26/05 Filed order (Mary M. SCHROEDER): The mtn of x-aplt Powerex' mtn for an ext of time to file a petn for rhrg and sugg for rhrg en banc is granted. Aple/x-aplt is granted an ext of 7 days from the date of this order within which to file a petn for rhrg and sugg for rhrg en banc. [02-57200 [*et al.*]] (crw) [02-57200 [*et al.*]]

2/2/05 Filed original and 50 copies Appellee/cross aplt Powerex Corp petition for panel rehearing and petition for rehearing en banc 20 pages, served on 2/1/05 (panel and active judges) (ji) [02-57200 [*et al.*]]

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3/3/05 Filed order (Mary M. SCHROEDER, William C. CANBY, Richard C. TALLMAN): . . . The petition for panel rehearing and the petition for rehearing en banc are denied. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

3/11/05 MANDATE ISSUED. Costs taxed against appellants Reliant and Duke for $3617.10. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

3/16/05 Filed aple/x-aplt Powerex Corp motion to recall the mandate. served on 3/15/05 [panel] (ji) [02-57200 [*et al.*]]

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3/25/05	Filed aples opposition to aple/x-aplt Powerex Corp to recall mdt. served on 3/25/05 PANEL [02-57200 [*et al.*]] (crw) [02-57200 [*et al.*]]
4/6/05	Filed order (Mary M. SCHROEDER): Aple/cross aplt, Powerex Corp.'s mtn to recall the mandate is denied. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]
6/1/05	Received letter from the Supreme Court dated 5/23/05 re: ext time within to file a petition for a writ of certiorari. Time extended until 7/1/05. (CASEFILE) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]
6/27/05	Received letter from the Supreme Court dated 6/22/05 re: granting further ext of time to file cert to 7/15/05. casefile. [02-57200 [*et al.*]] (crw) [02-57200 [*et al.*]]
7/22/05	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 5-85 filed on 7/15/05. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]
1/26/07	Received letter from the Supreme Court dated 1/19/07 re: granting the mtn Government of Canada for leave to file a brf as amicus curiae; the petition for a writ of cert is granted lmt to question 1 presented by the petition and parties are directed to brf and argue the following question: Whether the court of appeal had jurisdiction to review the district court's remand order, notwithstanding 28 USC Sec. 1447(d). [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55176

NRG ENERGY INC., ET AL.,
Defendants/Cross-claimants – Appellees,

v.

POWEREX CORP., ET AL.,
Cross-defendants – Appellants.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
1/30/03	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS sent: no. * * * * * [03-55176, 02-57200] (jr) [02-57200, 03-55176]
	* * * * *
2/20/03	Filed order (Ferdinand F. FERNANDEZ, Ronald M. GOULD): The court sua sponte consolidates these appeals. To better structure these proceedings, the court has designated Reliant Energy Services, Inc., and Duke Energy Trading and Marketing, LLC, et al., as appellants/cross-appellees. Powerex Corp., et al. has been designated as appellees/cross-appellants. The clerk shall amend the docket to reflect the above caption for these appeals. The court has received and reviewed aplts' response to this

court's 1/28/03 order to show cause in no. 02-57202. We conclude that the court has jurisdiction to entertain the appeals from the DC's 12/13/02 remand order . . . Accordingly, the order to show cause is DISCHARGED. Aplts' 2/7/03 emergency motion to stay the DC's remand order pending this court's ruling on the order to show cause is DENIED as moot. However, the court sua sponte GRANTS a stay of the DC's remand order pending these appeals. All prevsly established briefing schedules are VACATED. The following briefing schedule shall govern these consolidated appeals. * * * * * (PARTIES FAXED/MOATT) [02-57200 [*et al.*]] (hh) [02-57200 [*et al.*]]

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3/6/03 Filed plaintiff-appellees' motion for reconsideration of 2/20/03 order discharging order to show cause and staying remand pending appeal; served on 3/6/03 (to MOATT) [02-57200 [*et al.*]] (hh) [02-57200 [*et al.*]]

3/7/03 Filed order MOATT (JM) The court sua sponte consolidated these appeals to better structure these proceedings, in addition to Powerex Corp., the court designates Bonneville Power Administration and Western Power Administration as appellees/cross-appellants. The briefing schedule established in the court's 2/20/03 order filed in lead no. 02-57200 shall apply to these consolidated appeals. The clerk shall amend the docket to reflect the above caption for these appeals. [02-57200 [*et al.*]] (hh) [02-57200 [*et al.*]]

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6/16/03 Received original and 15 copies Reliant Energy Serv, Reliant Ormond Beach, Reliant Energy Etiwa, Reliant Energy Ellw, Reliant Energy Manda, Reliant Energy Cool, Duke Energy Trading, Duke Energy Morro, Duke Energy Moss, Duke Energy South, Duke Energy Oakland 1st cross-appeal brief, (Informal: NO) of 67 pages, with 4 excerpts of record, served on 6/16/03 deficient: Motion to seal the 1st brief is PENDING. Notified counsel. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

6/16/03 From Aplts Reliant Energy Serv Reliant Ormond Beach, Reliant Energy Etiwa, Reliant Energy Ellw, Reliant Energy Manda, Reliant Energy Cool, Aples Duke Energy Trading, Duke Energy Morro, Duke Energy Moss, Duke Energy South, Duke Energy Oakland, received notification to seal opening brief of aplt/cross aples and volume IV of Excerpts of Record served on 6/16/03. CASEFILE (ji) [02-57200 [*et al.*]]

6/16/03 Filed original and 15 copies UNDER SEAL (BRIEF AND VOL 4 EOR) Reliant Energy Serv, Reliant Ormond Beach, Reliant Energy Etiwa, Reliant Energy Ellw, Reliant Energy Manda, Reliant Energy Cool, Duke Energy Trading, Duke Energy Morro, Duke Energy Moss, Duke Energy South, Duke Energy Oakland, brief on cross-appeal (Informal: NO) of 67 pages and 5 copies of excerpts of record in 4 vols; served on 6/16/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

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6/27/03 Received orig. and 15 copies Arizona Electric's brief 28 pages deficient: Motion to file

MOATT. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

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7/28/03 Filed original and 15 copies Bonneville Power Ad, Western Area Pow Ad second brief on cross-appeal (Informal: NO) of 24 pages and 0 excerpts of record; (minor defcy: All consolidated cases number be listed on the cover sheet.); served on 7/25/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

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7/28/03 Filed Under Seal original and 15 copies appellee British Columbia Hyd's 49 pages brief, & 5 copies of Vol 2 Exc., 2 vols Excerpts of record; served on 7/28/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

7/28/03 Filed original and 15 copies Powerex Corp second brief on cross-appeal (Informal: NO) of 38 pages and 5 copies excerpts of record in 5 vols; served on 7/28/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

8/6/03 Rec'd notice of errata and corrected pages to opening brief from Appellee Powerex Corp, served 8/5/03 (RECORDS) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

8/6/03 Rec'd notice of errata and corrected pages to ans brief from Appellee British Columbia Hyd and Power Authority Filed Under Seal, served 8/5/03 (RECORDS) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

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9/5/03 Filed order (Ferdinand F. FERNANDEZ, Ronald M. GOULD): Aples' motion for recon of the court's 2/20/03 order is DENIED. CITE. Aples' motion for an ext of time to file

an answering brf is GRANTED. * * * * * [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

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10/15/03 Filed original and 15 copies aples People of the State, Ruth Hendrick, Cruz M. Bustamante, Barbara Matthews, Sweetwater Authority, Pamela R. Gordon's 46 pages brief, 1 Exc. vol; served on 10/14/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

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12/4/03 Filed original and 15 copies Reliant Energy Serv in 02-57200, Reliant Ormond Beach in 02-57200, Reliant Energy Etiwa in 02-57200, Reliant Energy Ellw in 02-57200, Reliant Energy Manda in 02-57200, Reliant Energy Cool in 02-57200, Duke Energy Trading in 03-55118, Duke Energy Morro in 03-55118, Duke Energy Moss in 03-55118, Duke Energy South in 03-55118, Duke Energy Oakland in 03-55118 third brief on cross-appeal (Informal: NO) of 35 pages and 5 copies 0 excerpts of record; (minor defcy: Incorrect color covers.); served on 12/4/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

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12/18/03 Received orig. and 15 copies British Columbia Hydro and Power Authority reply brief (Informal: NO) of 18 pages; with supplemental excerpts of record in 1 volume; served on 2/18/03 (deficient: Aple is not part of cross appeal). Notified counsel. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

12/18/03 Filed original and 15 copies aples/cross aplts Bonneville Power Admin and Western Area Power Admin reply brief, (Informal: NO) of

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12/18/03 Filed original and 15 copies aple/cross aplt Powerex Corp reply brief, (Informal: NO) of 27 pages; with excerpts in 1 volume; served on 12/18/03 (minor defcy: Incorrect color covers) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

12/18/03 Filed original and 15 copies British Columbia Hydro and Power Authority reply brief, (Informal: NO) 18 pages; supplemental excerpts in 1 vol; served on 12/18/03 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

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3/5/04 Filed Arizona Electric additional citations, served on 3/5/04 [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

3/18/04 Filed aplts/cross-aples Reliant and Duke additional citations, served on 3/17/04 (RECORDS) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

3/23/04 Filed order (Mary M. SCHROEDER, Johnnie B. RAWLINSON): Nos. 03-74526 and 03-74730 were consolidated with no. 01-71051, et al. Nos. 03-74252, 03-74415, 03-74526, 03-74527, 03-74531, 03-74547, 03-74548, 03-74550, 03-74582, 03-74590, 03-74592, 03-74604, 03-74629, 03-74631, 03-74647, 03-74653, 03-74654, 03-74655, 04-70564 and 04-70637 are consolidated with no. 01-71051, et al. Pursuant to the provisions of the Aug. 21, 2002 order, any entity granted leave to intvn in one case is deemed to have been granted leave to intvn in all of the consolidated cases. Accordingly, the mtns of Enron Mrktng, Duke Energy,

Merrill Lynch, Portland G.E.Co., Mirant Americas, Reliant Energy Power Generation, et al., Port of Seattle, Avista Corp., et al., L.A. Dept of Water and Power, CA Electricity Oversight Board, Pinnacle West Capital Corp., et al., Sempra Energy Trading Co., Williams Power Co., CA ISO, Northern CA Transmission Agency, So.CA Edison, PacifiCorp, City of Santa Clara, et al., and the TransCanada Energy, Ltd., for leave to intvn are denied as unnecessary. The mtns of the People of the State of CA to intvn in No. 03-74252, 03-74527, 03-74531, 03-74547, 03-74548, 03-74550, 03-74582, 03-74590, 03-74592, 03-74604, 03-74629, 03-74631, 03-74647, 03-74653, 03-74654, 03-74655, 03-74730 and the PUC to intvn in nos. 03-74527, 03-74531, 03-74582, 03-74547, 03-74548, 03-74550, 03-74590, 03-74592, 03-74604, 03-74629, 03-74631, 03-74653, 03-74654, 03-74655 and 03-74730 are granted. The mtn of the People of the State of CA for leave to intvn in NO. 04-70564 is denied in view of the consolidation of no. 04-70564 and 04-70637. The mtn of Coral Power for leave to file a late mtn to intvn is granted. In view of the consolidation of nos. 03-74252, 03-74523, 03-74531, 03-74548, 03-74582, 03-74654, 03-74415, 03-74526, 03-74527, 03-74531, 03-74547, 03-74548, 03-74647, 03-74582, 03-74590, 03-74592, 03-74604, 03-74629, 03-74647, 03-74653, 03-74654, 03-74655 and 03-74730, the mtn of the following entities to intvn in other petitions challenging the same rmd proceedings are denied as unnecessary; Morgan Stanley, Tucson Electric Power Co., PG&E, El Paso Merchant Energy, Puget Sound Energy, Inc., Modesto Irrigation

District, et al., Constellation Power, City of Vernon and Powerex. If any petitioner wishes to additionally participate as an intvnr in any of the cases consolidated by this order, it may file a renewed mtn upon the lifting of the stay. The renewed mtn shall state with specificity why movant's interests will not be addressed by another pty. (cite) Any renewed mtn shall also state movant's agreement to: (1) limit the combined length of the opening and intrvnr brief to 14,000 words, and (2) waive the filing of the reply brief. The mtns of Tucson Electric, et al., for leave to intvn in nos. 03-74647, 04-70564 and 04-70637 and PG&E and Powerex to intvn in no. 04-70564 are granted. However, the arguments offered as intvnrs must be included in the petitioners' briefs. In view of the provisions of the March 12, 2004 order staying proceedings, the mtns of IdaCorp, Salt River Project, Constellation Power, State Water Contractors, Tucson Electric, Automated Power Exchange, Morgan Stanley, Energy Plus, El Paso Merchant, City of Seattle, Portland G.E., Modesto Irrigation District, Powerex, PPL Energy Plus, and Sacramento Municipal to vacate the schedule are denied as moot. Within 14 days from the date of this order, Powerex Corp. shall tender the remainder of the dkt fee. Failure to satisfy the fee requirement will result in the dismissal of no. 03-74547 w/o further ntc. [re-dktd by je to include consolidated cases] [01-71051 [*et al.*]] (je) [01-71051 [*et al.*]]

* * * * *

3/25/04 Filed order (Deputy Clerk: gss/promo): The court is in receipt of NRG Energy's bank-

ruptcy status report which states that NRG Energy has emerged from bankrupcy. On or before 4/23/04, NRG Energy shall file their answering brf, a ntc of joinder in another aples' brf pursuant to Ninth Cir.R. 28-4, or if aple NRG Energy does not elect to file a brf, aple NRG Energy shall notify the court by ltr on or before the due date of the ans brf pursuant to Ninth Cir.R. 31-2.3. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

3/31/04 Received Timothy B Taylor for NRG Energy Inc letter dated 3/29/04 re: NRG Energy will not be filing a brief. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

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5/12/04 Filed aples additional citations, served on 5/12/04 (panel) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

5/13/04 Filed order (Deputy Clerk: hh) The mtn of cross-defs Arizona Electric Power Cooperative, Inc. et al. to appear as cross-aplts is granted in part. Movants may appear as cross-aplts for the limited purpose of having their proffered brf filed. The brf accompanying Movant's motion is ordered filed. Aplts Reliant Energy, et al. may file a responsive brf by 5/28/04. (phone/fax) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

6/14/04 ARGUED AND SUBMITTED TO Mary M. SCHROEDER, William C. CANBY, Richard C. TALLMAN [02-57200 [*et al.*]] (ea) [02-57200 [*et al.*]]

* * * * *

12/8/04 FILED OPINION: AFFIRMED IN PART; VACATED IN PART and REMANDED.

Costs are awarded to BPA, WAPA, and BC Hydro and against PowerEx. (Terminated on the Merits after Oral Hearing; Affirmed in part; Vacated in part and Remanded; Written, Signed, Published. Mary M. SCHROEDER, author; William C. CANBY; Richard C. TALLMAN. FILED AND ENTERED JUDGMENT. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

* * * * *

1/26/05 Filed order (Mary M. SCHROEDER): The mtn of x-aplt Powerex' mtn for an ext of time to file a petn for rhrg and sugg for rhrg en banc is granted. Aple/x-aplt is granted an ext of 7 days from the date of this order within which to file a petn for rhrg and sugg for rhrg en banc. [02-57200 [*et al.*]] (crw) [02-57200 [*et al.*]]

2/2/05 Filed original and 50 copies Appellee/cross aplt Powerex Corp petition for panel rehearing and petition for rehearing en banc 20 pages, served on 2/1/05 (panel and active judges) (ji) [02-57200 [*et al.*]]

* * * * *

3/3/05 Filed order (Mary M. SCHROEDER, William C. CANBY, Richard C. TALLMAN): . . . The petition for panel rehearing and the petition for rehearing en banc are denied. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

3/11/05 MANDATE ISSUED. Costs taxed against appellants Reliant and Duke for $3617.10. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

3/16/05 Filed aplc/x-aplt Powerex Corp motion to recall the mandate. served on 3/15/05 [panel] (ji) [02-57200 [*et al.*]]

* * * * *

3/25/05	Filed aples opposition to aple/x-aplt Powerex Corp to recall mdt. served on 3/25/05 PANEL [02-57200 [*et al.*]] (crw) [02-57200 [*et al.*]]
4/6/05	Filed order (Mary M. SCHROEDER): Aple/cross aplt, Powerex Corp.'s mtn to recall the mandate is denied. [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]
6/1/05	Received letter from the Supreme Court dated 5/23/05 re: ext time within to file a petition for a writ of certiorari. Time extended until 7/1/05. (CASEFILE) [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]
6/27/05	Received letter from the Supreme Court dated 6/22/05 re: granting further ext of time to file cert to 7/15/05. casefile. [02-57200 [*et al.*]] (crw) [02-57200 [*et al.*]]
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1/26/07	Received letter from the Supreme Court dated 1/19/07 re: granting the mtn Government of Canada for leave to file a brf as amicus curiae; the petition for a writ of cert is granted lmt to question 1 presented by the petition and parties are directed to brf and argue the following question: Whether the court of appeal had jurisdiction to review the district court's remand order, notwithstanding 28 USC Sec. 1447(d). [02-57200 [*et al.*]] (ji) [02-57200 [*et al.*]]

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 02-CV-1001

RELIANT ENERGY SERVICES, INC., ET AL.,
Plaintiffs,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Defendants.

MINUTES OF THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

It is hereby ordered that all Judges in the United States District Court, Southern District of California hereby recuse from [*sic*] the above entitled case. Pursuant to 28 U.S.C. 292(B) Chief Judge of the Ninth Circuit, Mary M. Schroeder hereby designates the Honorable Judge Robert H. Whaley, United States District Court for the Eastern District of Washington to perform the duties of United States District Judge temporarily for the Southern District of California for the above designated case.

New Case #: 02cv1001-RHW(NLS).

Please forward judge's court file to new assigned judge.

Date: June 7, 2002 Deputy: Jamie Ponzio

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 02-CV-990

RELIANT ENERGY SERVICES, INC.,
Plaintiff,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Defendants.

MINUTES OF THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

It is hereby ordered that all Judges in the United States District Court, Southern District of California hereby recuse themselves from the above entitled case. Pursuant to 28 U.S.C. 292(B) Chief Judge of the Ninth Circuit, Mary M. Schroeder hereby designates the Honorable Judge Robert H. Whaley, United States District Court for the Eastern District of Washington to perform the duties of United States District Judge temporarily for the Southern District of California for the above designated case.

New Case #: 02cv0990-RHW(LAB).

Please forward judge's court file to new assigned judge.

Date: June 12, 2002 Deputy: Jamie Ponzio

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 02-CV-1000

DUKE ENERGY TRADING AND MARKETING LLC, ET AL.,
Plaintiffs,

v.

ARIZONA PUBLIC SERVICE COMPANY, ET AL.,
Defendants.

MINUTES OF THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

It is hereby ordered that all Judges in the United States District Court, Southern District of California hereby recuse themselves from the above entitled case. Pursuant to 28 U.S.C. 292(B) Chief Judge of the Ninth Circuit, Mary M. Schroeder hereby designates the Honorable Judge Robert H. Whaley, United States District Court for the Eastern District of Washington to perform the duties of United States District Judge temporarily for the Southern District of California for the above designated case.

New Case #: 02cv1000-RHW(JAH).

Please forward judge's court file to new assigned judge.

Date: June 12, 2002 Deputy: Jamie Ponzio

[Counsel name/address blocks omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Coordination Proceeding
Special Title (Rule 1550(b))

Nos. CV 02-0990-JM(LAB)
CV 02-1000-L(JAH)
CV 02-1001-B(POR)

WHOLESALE ELECTRICITY
ANTITRUST CASES I & II

This Document relates To:

Reliant Energy Services, Inc., et al. v.
Arizona Electric Power Cooperative, Inc., et al.

Duke Energy Trading and Marketing, LLC, et al. v.
Arizona Public Service Company, et al.

Reliant Energy Services, Inc., et al. v.
Arizona Electric Power Cooperative, Inc., et al.

DECLARATION OF BARRY HIMMELSTEIN IN SUPPORT OF MOTION TO REMAND AND MOTION TO STRIKE AND/OR SEVER CROSS-COMPLAINTS

I, BARRY HIMMELSTEIN, declare and state:

1. I am a partner in the law firm of Lieff, Cabraser, Heimann & Bernstein, LLP, counsel for plaintiff Oscar's Photo Lab and Mary L. Davis in these coordinated actions. I have personal knowledge of the facts set forth herein, and could and would testify competently thereto if called upon to do so.

2. Attached hereto are true and correct copies of the following documents:

* * * * *

Exhibit 4	Printouts of the "What We Do" and "Facts and Figures" pages of Powerex's website, www.Powerex.com, and Page 30 of the 2001 BC Hydro Annual Report
Exhibit 5	Canadian Competition Bureau, News Release, Competition Bureau Closes Bid-Rigging Inquiry Involving Supply of Electricity in Alberta (Dec. 20, 2000)

* * * * *

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed this 2nd day of July, 2002, at San Francisco, California.

/s/ BARRY R. HIMMELSTEIN

Barry R. Himmelstein

[Address block omitted]

EXHIBIT 4

[Webpage graphics omitted]

What We Do

Powerex is the wholly-owned power marketing subsidiary of BC Hydro, Canada's third largest electric utility. Established in 1988, Powerex has grown to be a leading marketer of wholesale energy products and services in western Canada and the western United States, and a growing niche player in other markets in North America.

Customers: Our customer base has increased dramatically over the years, and now includes more than 150 consumer and investor owned utilities, municipalities, power pools, large industrials and power marketers who have come to know Powerex as a customer focused, highly flexible, reliable provider of energy solutions.

Products and Services: We offer our customers a variety of products and services that can be tailored to meet their changing daily and seasonal energy needs. Products like energy and capacity, and services like energy exchanges, natural gas trading and more. We can provide power for days, weeks, months or longer, and our fully staffed real-time trading desk means we're open 24 hours a day, 7 days a week. A variety of financial alternatives enhances our customer offerings.

Resources: As a physical supplier of power, our portfolio of resources is second-to-none. We purchase power from a wide variety of energy providers in BC, western Canada and across the US; and are marketers, on behalf of the BC government, of the highly reliable Canadian Entitlement power from the Columbia River Treaty. Combine this with our access to the flexibility and robust nature of BC Hydro's hydroelectric system, and we offer superior value to our customers.

Marketplace Expertise: At Powerex we've developed a strong understanding of and expertise in the complexities

of marketplace rules and transmission systems that enables us to efficiently and economically move power between regions to where our customers need it. And we've got all the necessary licenses and permits, from both Canadian and US regulators, to allow us to do business now, and for years to come.

Commitment: Powerex is a team of industry professionals committed to working with our customers to make deals happen. We place high value on integrity and trust. We believe that when our customers win, we win. And we pride ourselves on our ability to build and nurture mutually beneficial relationships.

About BC Hydro

BC Hydro is a Crown Corporation of the province of British Columbia, and the third largest electric utility in Canada, serving more than 1.6 million BC customers and generating between 43,000 and 54,000 GWh of electricity annually.

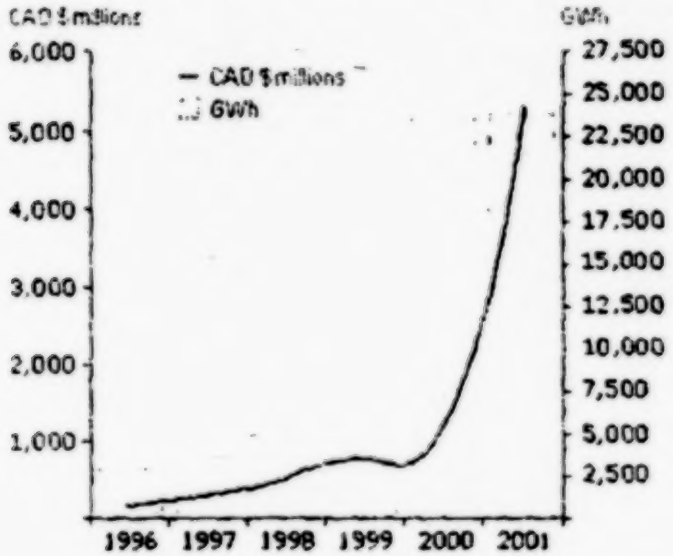
BC Hydro has constructed a world-class integrated hydroelectric system of close to 11,500 MW of generating capacity – over 10,000 of which are hydroelectric. Hydro's backbone electric system is interconnected with the western US by two 500 kV transmission lines on the west coast between BC and Washington, one 230 kV line connecting BC and Washington on the east side, and a 500 KV line to the east, connecting BC with Alberta.

Powerex's access to the flexibility of the BC Hydro system enables us to add value and shape power deliveries to customers across the western interconnected electric system.

[Webpage graphics omitted]

Quick Facts

- Established in 1988 as the wholly-owned power marketing and trading subsidiary of BC Hydro, Canada's 3rd largest electric utility.
- Located in Vancouver, British Columbia, on Canada's west coast.
- A leading marketer of wholesale energy products and services with approximately 150 customers in Western Canada and the United States. Customers include utilities, power pools, large industrials and power marketers.
- Increased revenues from CDN$51 million in 1995 to CDN$5.5 billion in 2000. For more detailed information please check out our Credit & Financials page.



- Over 130 employees in the areas of power marketing and trading, transmission management and scheduling, natural gas trading and gas transmission management, contracts, trade policy, credit and risk management, finance, accounting and IT.

- Offers a variety of energy products and services that can be tailored to meet individual customer needs. Products and services include: energy and capacity; 24-hour real-time service; seasonal energy exchanges; scheduling services; natural gas trading and more.
- Trades physical and financial products.
- Access to a portfolio of resources in Canada and the US including BC independent power producers (IPPs), utilities and marketers.
- Access to the flexibility and robust nature of the BC Hydro hydroelectric system.
- Responsible for marketing, on behalf of the BC government, the Canadian Entitlement power derived from the Downstream Benefits of the Columbia River Treaty. This highly reliable product currently amounts to 800 MW of capacity and increases to 1200 MW in 2003.
- Trades in the west via BC Hydro's interconnected electric system, comprised of two 500kv and one 230 kv line between BC and the US and one 500kv line between BC and Alberta.
- Holds all necessary trade permits including: export permits from the Canadian National Energy Board and the province of BC; export permits from the US Department of Energy; natural gas import and export permits from Canadian and US regulators.
- Received Power Marketing Authorization from the US Federal Energy Regulatory Commission (FERC) in 1997, enabling Powerex to buy and sell power anywhere in the US and to deliver power directly from BC to its US customers.

From page 30 of BC Hydro's 2001 Annual Report:

[Graphics omitted]

Powerex, BC Hydro's power marketing subsidiary, enjoyed a record-breaking year in fiscal 2001. In the first quarter alone, Powerex revenues broke the billion-dollar mark, nearly matching total revenues for the previous year. The company went on to increase revenues by over a billion dollars each quarter, ending the year with total sales of over $5 billion.

A COMBINED EFFORT

Powerex's success can be attributed to the experience, skills and market knowledge of Powerex staff, coupled with the ability of BC Hydro's Power Supply group to manage Hydro's electric generating system to maximize value. As well, unique market conditions in California resulted in an unusually high demand for power in the state and market-driven high prices for electricity.

WORKING IN PARTNERSHIP WITH CUSTOMERS

Powerex worked with three of BC Hydro's large industrial customers who wanted to take advantage of the strong market opportunities in 2000. In a one-time event, the customers agreed to shift the timing of their energy use during a high market demand period to a lower one. Powerex was then able to sell the resulting extra power on the spot market and the benefits were shared.

EXPANDING ITS PRESENCE

This year the company continued to expand its market east, signing enabling agreements with utilities and marketers across the U.S. Powerex is currently exploring setting up a small satellite office in Toronto to be ready for new business in the eastern regions when the Ontario marketplace opens up to wholesale competition. Staffing

levels have been increased across all areas to support Powerex's growth in trade and marketing activities. With a staff of clo to 120, the company has expanded its offices, building a larger trade floor at its downtown Vancouver location.

EXHIBIT 5

[Webpage graphics omitted]

Government of Canada

NEWS RELEASE

Competition Bureau Closes Bid-Rigging Inquiry Involving Supply of Electricity in Alberta

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OTTAWA, December 20, 2000 – The Competition Bureau announced today it has concluded that behaviour involving two importers of electricity into Alberta did not constitute bid-rigging under the *Competition Act*. Therefore, the Bureau has closed its inquiry.

In December of 1999, the Power Pool of Alberta, on the recommendation of the Market Surveillance Administrator, referred bidding behaviour that appeared to be consistent with criminal bid-rigging to the Bureau for further investigation under the *Competition Act*. The behaviour in question consisted of certain bids made by the British Columbia Power Exchange Corporation ("Powerex") and Enron Canada Corp. ("Enron") to supply power to the Power Pool of Alberta between June 1 and September 2, 1999.

"We took this complaint seriously. We conducted a thorough investigation, used formal search powers and seized records from both companies," said Johanne D'Auray, Deputy Commissioner of Competition, Criminal Matters. "The evidence suggests that the companies were employing independent business strategies and were not colluding on bids."

The Competition Bureau is an independent law enforcement agency whose mandate is to maintain and encourage fair competition in Canada.

For more information, please contact:

Cynthia Grant
Communication Advisor
Communications Directorate
(819) 994-0349

[Counsel name/address block omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Coordination Proceeding
Special Title (Rule 1550(b))

Nos. CV 02-0990-JM(LAB)
CV 02-1000-L(JAH)
CV 02-1001-B(POR)

WHOLESALE ELECTRICITY
ANTITRUST CASES I & II

This Document relates To:

Reliant Energy Services, Inc., et al. v.
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Arizona Public Service Company, et al.

Reliant Energy Services, Inc., et al. v.
Arizona Electric Power Cooperative, Inc., et al.

DECLARATION OF KENNETH G. PETERSON

I, Kenneth G. Peterson, declare as follows:

1. I have personal knowledge of the facts contained in this Declaration, except for those matters stated on information and belief, as to which I believe them to be true. If called as a witness, I could and would competently testify to all of the facts stated herein.

2. I have held the position of President and Chief Executive Officer of Powerex Corporation ("Powerex") since December 1, 1994.

3. I am trained as a resource economist and hold a masters degree in economics. Prior to joining Powerex, I was employed for 14 years with the British Columbia Hydro and Power Authority ("BC Hydro"). During my career

at BC Hydro, I was responsible for various aspects of resource planning and, in that capacity, developed an intimate knowledge of BC Hydro's generating resources, the evolution of domestic demand for electricity within BC Hydro's service area in British Columbia, and the potential for the export of electricity to interconnected jurisdictions, particularly in the United States. I had personal responsibility for overseeing the preparation of both resource plans and demand forecasts during my tenure at BC Hydro. When I began my career at BC Hydro, the corporation was in the latter stages of a very significant expansion of its generating capacity through the construction of major hydroelectric facilities in British Columbia. My understanding of the genesis of that construction program and its subsequent evolution is set out in the following paragraphs.

4. In 1962, the Provincial Government passed the British Columbia Hydro and Power Authority Act to establish a vehicle in which to hold assets it had acquired and to promote major hydroelectric development involving the construction of significant storage dams and generating capacity on the Peace and Columbia River systems (the "Two River Policy"). The Act was subject to litigation and ultimately declared ultra vires by the British Columbia Supreme Court in 1963. In 1964 the Provincial Government passed another British Columbia Hydro and Power Authority Act, which created the Provincial Crown Corporation known today as BC Hydro.

5. Once created, BC Hydro implemented the Two River Policy. Specifically, it began planning for the development of the W.A.C. Bennett Dam to create the Williston Reservoir on the Peace River. The Dam was completed in 1967. Since 1968, BC Hydro has further developed the hydroelectric potential of the Peace River with the installation of the Peace Canyon Dam and other power-related facilities.

6. In connection with the Two River Policy and its development of the Columbia River system, BC Hydro

joined the Provincial Government and the Canadian Government in negotiations with the United States between 1962 and 1964 to develop a Protocol to the Columbia River Treaty ("Treaty").

7. The formal documents that comprise the arrangements between Canada and the United States with respect to the Treaty are compiled in a book issued by the Canadian Departments of External Affairs and Northern Affairs and National Resources and published by the Queen's Printer and Controller of Stationery in February 1964. In April 1964, the Department of External Affairs issued a further volume explaining additional aspects of the process that led to the finalization of the Treaty and the Protocol. My review of these documents, together with my involvement with the Treaty in the context of my responsibilities at BC Hydro and later at Powerex, has informed my understanding of these historical events.

8. Attached as Exhibit A hereto is a true copy of the following pages from the book described in Paragraph 8: 58-81 (Columbia River Treaty); 82-90 (the formal press release issued by the Prime Minister of Canada on January 17, 1961, immediately after signing the Treaty, explaining its origin and effect); 100-106 (Canada-British Columbia Agreement dated July 8, 1963); 107-109 (Canada-British Columbia Agreement dated January 13, 1964); 110-114 (exchange of Notes and Protocol regarding the Columbia River Treaty); 115-121 (exchange of Notes and Attachment Relating to Terms of Sale).

9. The Treaty required Canada to construct storage facilities in Canada to control the flow of the Columbia River in a way that would enable the United States to generate more power at its existing facilities on the Columbia River (the "Downstream Benefits"), and entitled Canada to receive half of the Downstream Benefits over the 60-year life of the Treaty (the "Canadian Entitlement"). In 1963, the British Columbia Provincial Government negotiated an agreement with Canada that provided for British Columbia to directly receive the Down-

stream Benefits. This Agreement is found at pages 100-106 of Exhibit A.

10. In 1964, the Province, Canada, and the United States agreed to a Protocol for the implementation of the Treaty. The Protocol is found at pages 110-114 of Exhibit A. In two separate documents, it was agreed that British Columbia would receive an upfront payment in place of the first 30 years of the Canadian Entitlement. These two documents are found at pages 107-109 and 115-121 of Exhibit A.

11. In October 1964 BC Hydro prepared a booklet that consolidated for convenient reference a number of documents relating to the Treaty. Attached as Exhibit B hereto is a true copy of the following pages from the book described in Paragraph 11: 1; 39-45 (Canadian Entitlement Purchase Agreement); 47 (Designation of Canadian Entity); and 49-54 (Exchange of Notes).

12. In September 1964, Canada designated BC Hydro as the Canadian Entity under the Treaty. This Designation is found at page 47 of Exhibit B.

13. BC Hydro played a key role, through its then Chairman Hugh Keenlyside, in the negotiations that produced these important international and interprovincial agreements. As a result, BC Hydro was responsible for construction of the reservoir facilities on the Columbia River to fulfill Canada's obligations under the Treaty and has been responsible ever since for the ongoing implementation and administration of the Treaty. The arrangements made for the initial disposal are found in the Canadian Entitlement Purchase Agreement (the "CEPA") between BC Hydro and Columbia Storage Power Exchange, a non-profit corporation organized under the laws of the State of Washington. Mr. Keenlyside signed this document on behalf of BC Hydro and it was approved by an Exchange of Notes dated September 16, 1964, between Canada and the United States. True copies of the CEPA and the Exchange of Notes are found at pages 39-45 and 49-54 of Exhibit B.

14. During the negotiations related to the Columbia River Treaty, BC Hydro continued its parallel development of the Peace River pursuant to the Two River Policy.

15. Construction of the facilities contemplated by the Two River Policy were completed in 1984 with the completion of the Revelstoke Dam on the Columbia River.

16. During the 1980s, BC Hydro was an active seller of power to the United States entities, primarily the Bonneville Power Administration ("Bonneville"), with such sales taking place at the international border.

17. In the late 1980's, the Provincial Government overhauled the legislation governing the energy sector in British Columbia. The Provincial Government created Powerex as an export agency for the purpose of marketing power to United States entities. The Provincial Government wished to ensure that BC Hydro's surplus power was marketed in a manner that maximized the benefits to all British Columbians. Additionally, the Provincial Government wished to promote the development of electricity produced by independent power producers for sales to the United States market.

18. In December 1988, BC Hydro – acting as the agent of the British Columbia Provincial Government under § 3(1) of the Hydro Act – incorporated Powerex under the Company Act of British Columbia as a wholly owned subsidiary of BC Hydro to serve the vital role of marketing the Province's surplus electric power. Powerex was originally incorporated as the British Columbia Power Export Corporation on December 13, 1988. The company changed its name to British Columbia Power Exchange Corporation on February 15, 1991, and then changed its name again to Powerex Corp. on September 6, 2000. True and correct copies of the Articles of Incorporation and Certificates changing the name of the company are attached hereto as Exhibit C.

19. Following its incorporation in 1988, Powerex assumed its responsibility for marketing surplus power from the BC Hydro system. BC Hydro delivered surplus elec-

tricity to Powerex at the British Columbia border and Powerex, in turn, sold it to entities from the United States and Alberta at wholesale. Powerex continues to perform this function within this structure to the present day.

20. Since its incorporation, Powerex has also been called upon to serve some specific policy objectives set for it by the Provincial Government. For instance, in the early 1990's the Provincial Government approved Powerex as the appropriate vehicle to create a power exchange operation ("PEO") in British Columbia. The Provincial Government desired to promote a domestic independent power production industry by creating an efficient market for the private power. The PEO was approved as operational as of September 1993. The PEO contemplated Powerex making an auction market for the trading of electricity. The objectives for Powerex were set out in a document prepared by Powerex entitled "Opportunities in the Short-Term Electricity Market," which formed the basis for a presentation to stakeholders in early 1991 as part of the application process associated with the approval of the PEO. True copies of the relevant portions of this document are attached hereto as Exhibit D.

21. The PEO was part of the means by which Powerex was to meet the objectives of the Province. The PEO remained in place for a number of years, but did not fulfill expectations because of lack of interest from the generating sector. The PEO is no longer operational.

22. Powerex was directly involved with the realization of Provincial objectives in connection with the Columbia River Treaty commencing early in the 1990s. It was at that time that the Province began the process of determining how to receive or dispose of the Canadian Entitlement under the Treaty once their contracts for the sale of the Downstream Benefits began to expire in 1998. Under the Treaty, the United States would be obliged to return the Canadian Entitlement to Canada unless a resale could be negotiated and approved by both countries.

23. Commencing in early 1990, BC Hydro began discussions with the U.S. Army Corps of Engineers and Bonneville (collectively the U.S. Entity under the Treaty) to define the Canadian Entitlement. Discussions became more focused commencing in 1993 as representatives of the Province, BC Hydro, Bonneville, and the U.S. Army Corps of Engineers began meetings to address the issue.

24. Early on, the potential for resale of the Canadian Entitlement in the United States became a prominent part of the discussions. Mr. Ken Epp, then President of Powerex, was an early member of the negotiating team, along with the Deputy Minister of Energy, Petroleum Mines and Mineral Resources. Upon the retirement of Mr. Epp, I became President and CEO of Powerex. I was also a member of the Province's negotiating team. I remained in both capacities through the completion of the negotiating process that resulted in arrangements with the United States for the return and/or resale of the Canadian Entitlement effective April 1, 1999. The negotiation process with respect to the Canadian Entitlement took approximately seven years. While the negotiating team on the Canadian side varied from time to time, I was a part of it throughout the process. The final arrangements approved by both countries include a significant role for Powerex.

25. Pursuant to an Entitlement Assignment Agreement, the Province assigned all of its rights, title, and interests in the Entitlement to Powerex so that it can realize the maximum benefits of the surplus power for British Columbians. While the precise amount of the Canadian Entitlement is determined pursuant to very complex calculations, it is a very significant resource. A true copy of the Entitlement Assignment Agreement is attached hereto as Exhibit E.

26. In 1997, the Province passed the Power for Jobs Act ("Jobs Act"). The Jobs Act contemplates diverting portions of BC Hydro's surplus power or the Canadian Entitlement, which would otherwise be sold by Powerex to ex-

ternal markets, to British Columbia industry for the purpose of job creation. Pursuant to the Jobs Act, the Provincial Government was empowered to instruct either BC Hydro or Powerex to supply power to British Columbia industry on terms defined by the Provincial Government.

27. On behalf of Powerex, I have been involved in numerous negotiations between the Provincial Government and industrial undertakings contemplating locating facilities in British Columbia for which the price of power is a significant factor in making a location decision. Powerex was contemplated to play an important role in connection with the supply of power in each case. While those efforts have been unsuccessful, pursuant to the Jobs Act and at the direction of the Provincial Government, Powerex has supplied power on favorable terms to facilitate the expansion of some existing businesses in British Columbia.

28. On March 30, 1984, the Provincial Government entered into an agreement with the City of Seattle, Washington ("Seattle"), related to the Skagit River Treaty (the "Skagit Agreement"). Under the Skagit Agreement, Seattle agreed not to raise the High Ross Dam, which would have had the effect of flooding substantial areas of British Columbia. As compensation for the loss of the power benefits that would have been derived from the High Ross Dam, British Columbia agreed to deliver certain quantities of electricity to Seattle until 2066. A true copy of the Skagit Agreement is attached hereto as Exhibit F.

29. On December 3, 1985, the Province assigned certain of the Province's benefits and obligations under the Skagit Agreement to BC Hydro. A true copy of this document is attached hereto as Exhibit G. As a result of a 1996 Bonneville rate case, lengthy negotiations commenced between the Province, Seattle, and Bonneville regarding the transmission arrangements relating to the power provider under the Skagit River Treaty. Powerex took the lead role (on behalf of the Province) in negotiating a resolution of the issues among the parties. Effective February 1, 1999, BC Hydro entered into the "Agreement

for the Transmission of Skagit River Treaty Power between British Columbia Hydro and Power Authority and the City of Seattle" (the "Skagit Transmission Agreement"). A true copy of the Skagit Transmission Agreement is attached hereto as Exhibit H. Powerex executed a replacement power agreement with Bonneville, also effective February 1, 1999, under which Seattle was able to call upon Bonneville to deliver power to Seattle for the account of Powerex in the event Powerex was unable to deliver the Skagit River Treaty power pursuant to the Skagit Agreement. Additionally, Seattle and Bonneville executed a Point-to-Point Transmission Service Agreement ("Skagit PTP Agreement") for the necessary transmission capacity for the provision of the Skagit Treaty power. BC Hydro assigned its rights and obligations, and delegated its operating responsibilities under the Skagit Transmission Agreement and the Skagit PTP Agreement to Powerex, to the extent permitted by such agreements. A true copy of the BC Hydro – Powerex Assignment Agreement is attached hereto as Exhibit I.

30. Columbia Power Corporation ("CPC") and CBT Power Corp. ("CBT") were established by Columbia Basin Trust, a corporation established by Columbia Basin Trust Act. CPC and CBT were responsible for upgrading the Brilliant generating facilities. CPC/CBT's upgrade was secured by a power purchase agreement with West Kootenay Power (now UtiliCorp Networks Canada, Inc). Powerex entered into a Backstop Agreement with CPC/CBT to facilitate the Provincial Government's desire that CPC/CBT develop the Brilliant Dam upgrade. Under the Backstop Agreement, Powerex agreed to purchase electricity produced at the Brilliant facilities in the event West Kootenay Power defaults on its purchase obligation due to insolvency. A true copy of the Backstop Agreement is attached hereto as Exhibit J.

31. Powerex performs its role as the exclusive exporter of BC Hydro's surplus under my direction. I report in the normal course to my Board of Directors, but, on a day-to-

day basis, my management team and I are solely responsible for determining the manner in which Powerex meets its mandate to maximize the value of its export activities. Over the course of the 1990s, it became apparent that Powerex could better achieve its objectives by expanding its activities into acquiring and reselling power generated by parties other than BC Hydro. Again, under my direction, Powerex has expanded considerably in this area and has become an active trader in wholesale markets throughout North America. This has occurred under my direction and it is my belief that it has assisted British Columbia in achieving its objective of obtaining maximum value for the surplus power generated from British Columbia to the benefit of British Columbia taxpayers and ratepayers.

32. BC Hydro's Board of Directors appoints Powerex's Board of Directors. A number of Powerex's current executives previously worked at BC Hydro.

33. Powerex does not pay Canadian federal and Provincial income tax.

34. BC Hydro is a Crown corporation, incorporated in 1964 pursuant to the British Columbia Hydro and Power Authority Act. BC Hydro is owned in its entirety by Her Majesty the Queen in Right of the Province of British Columbia, by which name the Province of British Columbia (the "Province") is formally known. Dividends from the operations of BC Hydro are payable only to the Province.

35. The Lieutenant Governor in Council (the Executive Council of the Province) appoints BC Hydro's Board of Directors. A true copy of Orders in Council Nos. 751/2001, dated August 9, 2001, and 847/2001, dated September 25, 2001, appointing BC Hydro's Board of Directors, are attached hereto as Exhibit K. To my knowledge, no subsequent Orders in Council have been passed amending, rescinding, or superseding the above-described Orders in Council. BC Hydro, as the sole shareholder of Powerex, is authorized to appoint Powerex's Board of Directors. It does so by issuing a resolution naming the Board mem-

bers. Outside members of Powerex's current Board of Directors were subject to concurrence by the Office of the Premier. A true copy of the Extract from the Minutes of a Meeting of the Board of Directors of British Columbia Hydro and Power Authority held on October 18, 2001, is attached hereto as Exhibit L.

36. All substantive powers of BC Hydro are subject to, and can only be exercised with, the approval of the Lieutenant Governor in Council or the Minister responsible for BC Hydro.

37. BC Hydro's corporate objective is to support the development of the Province of British Columbia through the efficient supply of electricity. On behalf of the Province, BC Hydro operates an electric utility involved in the generation, transmission, and distribution of electricity.

38. BC Hydro maintains authority over Powerex through various arrangements, including a Risk Management Committee that oversees the financial exposure to which Powerex is subject. The Risk Management Committee is required to make periodic reports to the Provincial Government's Ministry of Finance.

39. BC Hydro also acts as the treasury for Powerex and facilitates the issuance of letters of credit in support of Powerex's commercial arrangements.

40. BC Hydro's borrowings and other fiscal arrangements are provided through, and therefore are supported by, the Provincial Government. As a result, BC Hydro maintains a credit rating equal to that of the Province. Powerex's commercial arrangements, in turn, are frequently supported by a guarantee from BC Hydro, thus providing Powerex the benefit of both BC Hydro's credit rating as well as the implied backing of the Provincial Government.

41. BC Hydro sells all of its surplus electricity to Powerex, and all of those sales take place at the Provincial border. BC Hydro does not, and has not, sold power at points of delivery in the United States. BC Hydro has

never participated in the bidding process established by the CalPX and ISO.

42. Powerex maintains two rate schedules on file with FERC under which it sells power generated by BC Hydro at wholesale in United States interstate commerce pursuant to market-based rate authority granted by FERC on September 24, 1997.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this Declaration was executed this 9th day of August 2002, at Belle Fourche, South Dakota.

/s/ Kenneth G. Peterson
KENNETH G. PETERSON

LIST OF EXHIBITS

* * * * *

E – Entitlement Assignment Agreement

F – Skagit Agreement

* * * * *

H – Skagit Transmission Agreement

I – BC Hydro-Powerex Assignment Agreement

* * * * *

EXHIBIT E

[Powerex logo]

March 28, 2001

DELIVERED

The Authorized Representative for the Province
Mr. Charles Kang
Deputy Minister
Ministry of Employment and Investment
PO Box 9327, Station Prov. Govt.
Victoria, BC V8W 9N3

Dear Sir:

Entitlement Assignment Agreement

We refer to the Entitlement Assignment Agreement effective the 1st day of April, 1999 among the Province, BC Hydro (as the Canadian Entity under the Columbia River Treaty) and Powerex ("Entitlement Assignment Agreement"). Capitalized terms in this Letter Agreement will have the meanings ascribed to them in the Entitlement Assignment Agreement.

As you know from discussions among our respective representatives, electricity market prices available for next summer are considered to be attractive, and might not be available in the spot market at the time. Powerex has proposed to the Province that it may want to consider locking in a portion of the Deemed Entitlement Amount at a fixed price for next summer to manage price risk, and the Province has agreed that this is a prudent approach.

Thus, in accordance with Section 6.4 of the Entitlement Assignment Agreement, this letter confirms the Province's and Powerex's agreement to lock in 50 MW of the Deemed Entitlement Amount, at the following Monthly Prices for

the following quantities of the Deemed Entitlement Amount:

July 2001	–	12,787 MW.h at $415.39 US per MW.h
August 2001	–	13,657 MW.h at $415.39 US per MW.h
September 2001	–	13,216 MW.h at $415.39 US per MW.h

In accordance with the Entitlement Assignment Agreement, these Deemed Entitlement Amounts are determined after deduction of losses (3.6%) provided for in the Entity Agreement. The foregoing Monthly Prices are based on the Province's and Powerex's assessment of forward prices being offered in the market at present, take into account a Selling Brokerage Fee, and reflect transmission costs from the Points of Border Delivery for which Powerex will be responsible.

Yours truly,

POWEREX CORP.

Per: /s/ KEN G. PETERSON
Ken G. Peterson, Authorized Representative

PROVINCE OF BRITISH COLUMBIA

Agreed to and confirmed this 4th day of April 2001

Per: /s/ CHARLES KANG
Charles Kang, Authorized Representative

And: /s/ CHRIS TRUMPY
Chris Trumpy, Deputy Minister of Finance and Corporate Resident

c: King Lum
Shelley Murphy
Rohan Soulsby

[Powerex logo]

March 2, 2001

DELIVERED

The Authorized Representative for the Province
Mr. Charles Kang
Deputy Minister
Ministry of Employment and Investment
PO Box 9327, Station Prov. Govt.
Victoria, BC V8W 9N3

Dear Sir:

Entitlement Assignment Agreement

We refer to the Entitlement Assignment Agreement effective the 1st day of April, 1999 among the Province, BC Hydro (as the Canadian Entity under the Columbia River Treaty) and Powerex ("Entitlement Assignment Agreement"). Capitalized terms in this Letter Agreement will have the meanings ascribed to them in the Entitlement Assignment Agreement.

As you know from discussions among our respective representatives, electricity market prices available for next summer are considered to be attractive, and might not be available in the spot market at the time. Powerex has proposed to the Province that it may want to consider locking in a portion of the Deemed Entitlement Amount at a fixed price for next summer to manage price risk, and the Province has agreed that this is a prudent approach.

Thus, in accordance with Section 6.4 of the Entitlement Assignment Agreement, this letter confirms the Province's and Powerex's agreement to lock in 50 MW of the Deemed Entitlement Amount, at the following Monthly Prices for the following quantities of the Deemed Entitlement Amount:

July 2001	–	12,787 MW.h at $350.64 US per MW.h
August 2001	–	13,657 MW.h at $350.64 US per MW.h
September 2001	–	13,216 MW.h at $350.64 US per MW.h

In accordance with the Entitlement Assignment Agreement, these Deemed Entitlement Amounts are determined after deduction of losses (3.6%) provided for in the Entity Agreement. The foregoing Monthly Prices are based on the Province's and Powerex's assessment of forward prices being offered in the market at present, take into account a Selling Brokerage Fee, and reflect transmission costs from the Points of Border Delivery for which Powerex will be responsible.

Yours truly,

POWEREX CORP.

Per: /s/ KEN G. PETERSON
Ken G. Peterson, Authorized Representative

PROVINCE OF BRITISH COLUMBIA

Agreed to and confirmed this 5th day of March 2001

Per: /s/ CHARLES KANG
Charles Kang, Authorized Representative

And: /s/ CHRIS TRUMPY
Chris Trumpy, Deputy Minister of Finance and Corporate Resident

c: King Lum
Shelley Murphy
Rohan Soulsby

[Powerex logo]

January 15, 2001

DELIVERED

Minister of Employment and Investment
Parliament Buildings
Room 124
PO Box 9046 Stn Prov Govt
Victoria, BC
V8W 9E2

and

British Columbia Hydro and Power Authority
333 Dunsmuir Street
Vancouver, B.C.
V6B 5K3

Attention: Mr. Michael Costello

Dear Sirs:

Entitlement Assignment Agreement amendment

We refer to the Entitlement Assignment Agreement effective the 1st day of April, 1999 among the Province, B.C. Hydro, as the Canadian Entity, and Powerex ("Entitlement Assignment Agreement"). Capitalized terms in this Letter Agreement will have the meanings ascribed to them in the Entitlement Assignment Agreement.

As you know from discussions among our respective representatives, the DowJones Mid-Columbia firm index price, referred to in Appendix 1 of the Entitlement Assignment Agreement, has exceeded the Price Cap on numerous occasions over the past several months, and is expected to continue to do so during the remainder of this fiscal year.

The purpose of the Price Cap was to limit Powerex's risk exposure when: (a) unusually high market clearing prices are the result of a thinly traded market into which Powerex is not able to sell large volumes such as the Deemed Entitlement Amount, and (b) Powerex has sold portions of the Deemed Entitlement Amount forward and therefore is not able to realize the daily spot market price on the entire Deemed Entitlement Amount.

The price excursions this year have been sustained for many hours at a time, and Powerex was able in most circumstance [*sic*] to realize these prices with their electricity market sales. Thus the implementation of the Price Cap for much of this year would be inconsistent with the pricing principles outlined in Sections 6.1 and 6.2, i.e. that the Monthly Price reflect fair market value and the ATC Price reflect the market price of a monthly block of power.

Powerex proposed temporary elimination of the Price Cap for the Deemed Entitlement Amount in writing on June 14, 2000 and the Province agreed June 22, 2000, subject to formal agreement. Powerex and the Province further agreed at a July 14, 2000 meeting that the pricing methodology described in Appendix 1 of the Entitlement Assignment Agreement would continue to apply with the exception that the Price Cap would not apply to the Deemed Entitlement Amount for the balance of the fiscal year ending March 31, 2001, subject to Powerex proposing an alternative approach to limiting the price risk to Powerex.

Powerex and the Province have operated on the basis of these agreements since June, 2000. In addition, Powerex and the Province have operated on the basis that the Price Cap has not applied in determining the ATC Price during the same period. On December 11, 2000, Powerex proposed to set the Price Cap for the Monthly Price and ATC Price at US $1,000 in order to limit price risk where the DowJones Mid-Columbia firm index price is above $1,000 per MW.h but trading is thin at that price.

This Letter Agreement confirms the parties' agreement that for the period June 1, 2000 to March 31, 2001:

(a) the Monthly Price for the Deemed Entitlement Amount will be the monthly price determined in accordance with the pricing methodology in Appendix 1, except that the Price Cap for purposes of Section 2.1 of Appendix 1 will be deemed to be US $1,000, notwithstanding the definition of "Price Cap" in Section 2.3 of Appendix 1;

(b) the ATC Price for deemed purchases of the PFJ Block Amount will be determined in accordance with the pricing methodology in Appendix 1, except that the Price Cap for purposes of Section 2.2 of Appendix 1 will be deemed to be US $1,000, notwithstanding the definition of "Price Cap" in Section 2.3 of Appendix 1; and

(c) the authorized representatives may, at any time and from time to time, agree to a new Price Cap or method of determining the Price Cap. Any such agreement may be for any period from the date of this Letter Agreement until March 31, 2001.

The parties to the Entitlement Assignment Agreement recognize that due to potential future price volatility, it may be advisable to amend Appendix 1 to better deal with the Price Cap and the potential need for other adjustments to the pricing methodology. The parties therefore acknowledge that they have requested their authorized representatives to reconsider the Price Cap methodology and adjustment mechanisms in the Entitlement Assignment Agreement and to recommend amendments, if any are determined to be appropriate, to the Entitlement Assignment Agreement, any such amendments to be effective April 1, 2001.

In all other respects the Entitlement Assignment Agreement continues in full force and effect and unamended. If the foregoing accurately confirms the agreement reached

between us, could you kindly sign a counterpart of this Letter Agreement and return it to the attention of the writer.

Yours very truly,

POWEREX CORP.

Per: /s/ KEN G. PETERSON
Ken G. Peterson, President and CEO

Agreed to and confirmed this 15th day of January, 2001

PROVINCE OF BRITISH COLUMBIA

Per: /s/ TIM STEVENSON
The Honourable Tim Stevenson
Minister of Employment and Investment

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY, in its capacity as the Canadian Entity under the Columbia River Treaty.

Per: /s/ J.G. REDFORD FOR MICHAEL COSTELLO
Michael Costello, President and CEO

[Powerex logo]

December 1, 2000

DELIVERED

The Authorized Representative for the Province:
Mr. Charles Kang
Deputy Minister
Ministry of Employment and Investment
PO Box 9327, Station Prov. Govt.
Victoria, BC V8W 9N3

Dear Sir:

Entitlement Assignment Agreement

We refer to the Entitlement Assignment Agreement effective the 1st day of April, 1999 among the Province, BC Hydro (as the Canadian Entity under the Columbia River Treaty) and Powerex ("Entitlement Assignment Agreement"). Capitalized terms in this Letter Agreement will have the meanings ascribed to them in the Entitlement Assignment Agreement. As you know from discussions among our respective representatives, electricity market prices available for next summer are considered to be attractive, and might not be available in the spot market at the time. Powerex has proposed to the Province that it may want to consider locking in a small portion of the Deemed Entitlement Amount, 100 MW, at a fixed price for next summer to manage price risk, and the Province has agreed that this is a prudent approach.

Thus, in accordance with Section 6.4 of the Entitlement Assignment Agreement, this letter confirms the Province's and Powerex's agreement to the following Monthly Prices for the following quantities of the Deemed Entitlement Amount:

July 2001	–	25,573 MW.h at $185.89 US per MW.h
August 2001	–	27,314 MW.h at $185.89 US per MW.h
September 2001	–	26,433 MW.h at $185.89 US per MW.h

In accordance with the Entitlement Assignment Agreement, these Deemed Entitlement Amounts are determined after deduction of losses (3.6%) provided for in the Entity Agreement. The foregoing Monthly Prices are based on the Province's and Powerex's assessment of forward prices being offered in the market at present, take intc account a Selling Brokerage Fee and reflect that transmission costs from the Points of Border Delivery are for the account of Powerex.

Yours truly,

POWEREX CORP.

Per: /s/ KEN G. PETERSON
Ken G. Peterson, Authorized Representative

Agreed to and confirmed this 1st day of Dec. 2000

PROVINCE OF BRITISH COLUMBIA

Per: /s/ CHARLES KANG
Charles Kang, Authorized Representative

c: King Lum
Shelley Murphy
Rohan Soulsby

[Powerex logo]

December 1, 2000

The Honourable Tim Stevenson
Minister of Employment & Investment
P. O. Box 9327, St. Prov. Gov't.
Victoria, BC
V8W 9N3

Mr. Michael Costello
President and Chief Executive Officer
BC Hydro
18th Floor, 333 Dunsmuir Street
Vancouver, BC V6B 5R3

Dear Minister Stevenson and Mr. Costello:

Under Section 16.2 of the Entitlement Assignment Agreement and under Section 14.1 of the Electricity Purchase Agreement, the parties to the Agreements are required to appoint an Authorized Representative.

Under Section 13.2 of the Entitlement Assignment Agreement, the parties to the Agreement are required to appoint a representative for the Implementation Committee.

Under Section 16.4 of the Entitlement Assignment Agreement and under Section 14.3 of the Electricity Purchase Agreement, the parties to the Agreements are required to designate a representative for receiving notices under the Agreements.

This letter is to inform you of the following appointments and designations.

The Authorized Representative for Powerex for both of the Agreements will be:

Mr. Ken Peterson
President & CEO
Powerex
1400 - 666 Burrard Street
Vancouver, BC V6C 2X8

Telephone: (604) 891-5035
Facsimile: (604) 891-5015

Provided that for the period December 6, 2000 to January 12, 2001 the Authorized Representative for Powerex will be:

Doug Little
Vice President Trade Policy & Development
Powerex
1400 - 666 Burrard Street
Vancouver, BC V6C 2X8

Telephone: (604) 891-5063
Facsimile: (604) 891-5015

The representative on the Implementation Committee for Powerex will be:

Mr. Murray Margolis
Head Trader
Powerex
1400 - 666 Burrard Street
Vancouver, BC V6C 2X8

Telephone: (604) 891-5022
Facsimile: (604) 891-5045

The designate for receiving notices for both Agreements for Powerex will be:

Mr. King Lum
Director, Contracts
Powerex
1400 - 666 Burrard Street
Vancouver, BC V6C 2X8

Telephone: (604) 891-5062
Facsimile: (604) 891-5015

Yours truly,

/s/ KEN PETERSON

Ken Peterson
President & Chief Executive Officer
Powerex Corp.

Copies to:

For the Province:

Ms. Shelley Murphy
Senior Advisor, Electricity Development Branch
Ministry of Employment and Investment
PO Box 9327, Stn Prov Govt
Victoria, BC V8W 9N3

For BC Hydro:

Mr. Rohan D. Soulsby
Manager
BC Hydro
Business Development
Power Supply
6911 Southpoint Drive, 15th Floor
Burnaby, BC V3N 4X8

For Powerex:

Mr. King Lum
Director, Contracts
Powerex
1400 - 666 Burrard Street
Vancouver, BC V6C 2X8

C: Mr. Murray Margolis
Mr. Doug Little

THIS ENTITLEMENT ASSIGNMENT AGREEMENT is effective the 1st day of April, 1999 (the "Effective Date"),

BETWEEN:

PROVINCE OF BRITISH COLUMBIA, as represented by the Minister of Employment and Investment,

(the "Province")

AND:

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY, in its capacity as a Canadian Entity under the Treaty;

(the "Canadian Entity")

AND:

BRITISH COLUMBIA POWER EXCHANGE CORPORATION, a British Columbia company having its principal office at 1400 - 666 Burrard Street, Vancouver, British Columbia V6C 2X8

("Powerex")

WHEREAS:

A. Canada and the United States of America are parties to the "Treaty between Canada and the United States of America relating to the Cooperative Development of the Water Resources of the Columbia River Basin" including its Annexes A and B, signed at Washington, District of Columbia, United States of America on the 17th day of January, 1961, and the Protocol, brought into force by exchange of instruments of ratification and an exchange of notes on September 16, 1964 (the "Treaty"); and

B. Pursuant to Article V(2) of the Treaty, the United States is obligated to deliver to Canada the Canadian Entitlement at a point on the Canada – United States boundary near Oliver, British Columbia, or at such other place as the entities (designated under the Treaty) may

agree upon, and the Canadian Entity and the U.S. Entity have entered into the Entity Agreement for that purpose; and

C. Pursuant to Article VIII(1) of the Treaty, portions of the Canadian Entitlement may be disposed of within the United States with the authorization of Canada and the United States evidenced by an exchange of notes; and

D. Under the terms of the Canada-British Columbia Agreement all proprietary rights, title, and interests in the Canadian Entitlement accruing to Canada belong to the Province; and

E. By an exchange of notes effective March 31, 1999 (the "1999 Exchange of Notes") Canada and the United States have authorized disposals of all or portions of the Canadian Entitlement within the United States with delivery and other arrangements for such disposals to be made in accordance with the Disposal Agreement; and

F. Pursuant to the Disposal Agreement, the Province may exercise certain rights with respect to delivery of portions of the Canadian Entitlement at Points of Entitlement Delivery (as defined in the Disposal Agreement); and

G. The Province wishes to assign all of its proprietary rights, title and interests in the Canadian Entitlement and under the Disposal Agreement to Powerex on the terms and conditions contained in this Agreement.

NOW THEREFORE the parties agree as follows:

1. DEFINITIONS

1.1. For purposes of this Agreement:

(a) "ATC Price" or "Around the Clock Price" means for any Month the price per MW.h for that Month, determined in accordance with the Purchases Pricing Principle and this Agreement, and as at the Effective Date means the price determined in accordance

with the pricing methodology established in Appendix 1;

(b) "B.C. Hydro" means British Columbia Hydro and Power Authority, not acting in its role as Canadian Entity under the Treaty;

(c) "Buying Brokerage Fee" means an amount equal to a typical arms-length third party broker's fee paid by a buyer for brokering purchases of monthly blocks of power in the western interconnection where the broker does not take title to the power;

(d) "Canada-British Columbia Agreement" means the agreement between Canada and the Province dated July 8, 1963, as amended, providing for assignment of certain rights and obligations under the Treaty from Canada to the Province;

(e) "Canadian Entitlement" means at any time the downstream power benefits to which Canada is entitled at that time as described in Articles V(1) and VII of the Treaty and determined in accordance with the Treaty;

(f) "Canadian Entitlement Rights" means the rights to the Canadian Entitlement, the rights under the Disposal Agreement and all associated rights granted or assigned pursuant to this Agreement;

(g) "Deemed Entitlement Amount" means for any Month the amount of Canadian Entitlement determined in accordance with the Treaty and the Entity Agreement that Powerex would be entitled to receive at the Points of Border Delivery during that Month assuming no disposals within the United States (including disposals by way of reduction of the U.S. obligation pursuant to the Disposal Agreement), af-

ter deduction of losses provided for in the Entity Agreement;

(h) "deliver" means make available in the case of electrical capacity or deliver in the case of electrical energy, or both, as the context may require and derivatives of "deliver" have corresponding meanings;

(i) "Disposal Agreement" means the Agreement on Disposals of the Canadian Entitlement within the United States for April 1, 1998 through September 15, 2024, entered into between Bonneville Power Administration (acting on behalf of the U.S. Entity under the Treaty) and the Province (acting as a Canadian entity under the Treaty) on March 29, 1999;

(j) "Electricity Purchase Agreement" means the agreement, providing for supply of power by Powerex to B.C. Hydro to be entered into between the Province, Powerex and B.C. Hydro concurrently with the parties entering into this Agreement;

(k) "Entitlement Pricing Principle" means the pricing principle established by Section 6.1;

(l) "Entity Agreement" means the "Columbia River Treaty Entity Agreement on aspects of the delivery of the Canadian Entitlement for April 1, 1998 through September 15, 2024" entered into between the Canadian Entity and the U.S. Entity, dated March 29, 1999;

(m) "Month" means a calendar month;

(n) "Monthly Price" means for any Month the price per MW or, per MW.h for Canadian Entitlement determined in accordance with the Entitlement Pricing Principle and this

Agreement, and as at the Effective Date means the price determined in accordance with the pricing methodology established in Appendix 1;

(o) "Net Entitlement Revenue" means the net amounts credited or charged to the Settlement Account each Month, as described in Section 5.1;

(p) "PFJ Block Amount" means for any period the total amount of energy in MW's to be delivered flat over all hours during that period by Powerex to B.C. Hydro pursuant to the Electricity Purchase Agreement;

(q) "Points of Border Delivery" means the Points of Delivery for Canadian Entitlement at the Canada-United States boundary as defined in the Entity Agreement;

(r) "Prime Rate" means the annual rate of interest published by Powerex's principal banker from time to time as its prime rate;

(s) "Purchases Pricing Principle" means the pricing principle established by Section 6.2;

(t) "Selling Brokerage Fee" means an amount equal to a typical arms-length third party broker's fee paid by a seller for brokering sales of monthly blocks of power in the western interconnection where the broker does not take title to the power;

(u) "Settlement Account" means the account to be maintained in the books and records of Powerex to which Net Entitlement Revenue is credited or charged; and

(v) "Transmission Cost" means Transmission Cost as defined in the Entity Agreement.

1.2. **Interpretation**

Unless otherwise specified, all references to Sections and Appendices are to those set forth in this Agreement. Reference to any party includes any permitted successor or assignee. The term "including" followed by descriptive words is used in this Agreement by way of example only and is not intended to limit the scope of the provision. The headings used in this Agreement are for convenience and reference purposes only.

2. ASSIGNMENT OF CANADIAN ENTITLEMENT AND AGREEMENT RIGHTS

2.1. **Rights to Canadian Entitlement**

The Province hereby sells, assigns and transfers to Powerex all of the Province's proprietary rights, title and interest in the Canadian Entitlement.

2.2. **Rights under Disposal Agreement**

The Province hereby sells, assigns and transfers to Powerex all its right, title and interest in and to the Disposal Agreement, as permitted pursuant to Section 7.7 of the Disposal Agreement, and Powerex hereby assumes all of the obligations of the Province under the Disposal Agreement. At the request and cost of Powerex, the Province agrees to take any actions and exercise any rights under the Disposal Agreement that must be exercised by the Province.

2.3. **Rights under Future Agreements**

At the request of Powerex, the Province will use reasonable efforts to negotiate other agreements with the U.S. Entity or Bonneville Power Administration relating to the Canadian Entitlement, including an agreement providing for exchanges of Canadian Entitlement for power in certain circumstances. Upon any such agreements being com-

pleted to the satisfaction of Powerex, the Province will, subject to appropriate approvals being obtained, assign to Powerex all its right, title and interest in and to any such agreement and Powerex will assume all of the obligations of the Province under any such agreement. At the request and cost of Powerex, the Province agrees to take any actions and exercise any rights under any such agreement that must be exercised by the Province.

2.4. **Province to Give Notice of Assignments**

The Province will forthwith notify the other parties to the Disposal Agreement and any agreement referred to in Section 2.3 of the assignments made in this Section 2.

3. **TERM OF ASSIGNMENT**

3.1. **Term**

Notwithstanding the actual date of execution of this Agreement, the term of this Agreement and the assignments under it will be from the Effective Date until September 15, 2024.

4. **POWER FOR JOBS**

4.1. **PFJ Allocated Amount**

From time to time the Province may by written notice to Powerex, accompanied by Orders-in-Council pursuant to the Power for Jobs Development Act (British Columbia), specify an amount of capacity and associated energy that will be allocated to its Power for Jobs initiative.

4.2. **Powerex to Enter into Electricity Purchase Agreement**

Concurrently with the execution of this Agreement, Powerex and the Province will enter into the Electricity Purchase Agreement with B.C. Hydro

under which Powerex agrees to supply the PFJ Block Amount to B.C. Hydro.

5. PAYMENT FOR CANADIAN ENTITLEMENT RIGHTS ASSIGNED

5.1 Net Entitlement Revenue

Each Month Powerex will credit (or charge in the case of a negative amount) to the Settlement Account for the assignment of the Canadian Entitlement Rights an amount in respect of the previous Month equal to:

(a) the Deemed Entitlement Amount for that Month, less any amount that is subject to agreed pricing pursuant to Section 6.4, multiplied by the Monthly Price; plus

(b) any amount that is subject to agreed pricing pursuant to Section 6.4, multiplied by the agreed price for that amount; minus

(c) Transmission Cost, if agreed to pursuant to Section 6.6; minus

(d) the PFJ Block Amount for the Month, multiplied by the ATC Price; plus

(e) the aggregate amount actually received that Month from B.C. Hydro, including interest received on overdue amounts, as payment for the PFJ Block Amount delivered by Powerex to B.C. Hydro (during any previous Month) pursuant to Section 6.1 of the Electricity Purchase Agreement.

Amounts credited or charged to the Settlement Account will be paid in accordance with Sections 7.4 and 7.5.

5.2. Powerex to Provide Information

Powerex will provide to the Province monthly at the time amounts are credited or charged to the

Settlement Account pursuant to Section 5.1 sufficient information to enable the Province to verify the amount credited or charged to the Settlement Account and to otherwise verify that the Pricing Principles and the terms and conditions of this Agreement are being met.

6. PRICING PRINCIPLES

6.1. Entitlement Pricing Principle

The Province and Powerex declare that the price provisions of this Agreement are intended to establish as the "Monthly Price" at any time a sale price for the following Month that reflects the fair market value of Canadian Entitlement delivered at the British Columbia-United States border during that Month. For purposes of this Section 6.1, "fair market value" at any time means the fair market value, less the Selling Brokerage Fee, determined prospectively (or by a methodology which is determined prospectively) of a monthly quantity of power having the attributes of the Canadian Entitlement at that time, including:

(a) the amount of capacity and energy comprised in the Canadian Entitlement for the Month;

(b) the requirements for scheduling Canadian Entitlement;

(c) the firmness of Canadian Entitlement and the remedies for failure to deliver;

(d) the nature of the transmission rights, including any limitations, required to deliver Canadian Entitlement; and

(e) any limitations on the ability of the Canadian Entity to receive Canadian Entitlement capacity and/or energy at the Nelway and Waneta Points of Border Delivery.

6.2. **Purchases Pricing Principle**

The Province and Powerex declare that the price provisions of this Agreement are intended to establish as the "ATC Price" at any time a purchase price for the following Month of power delivered at the British Columbia-United States border during that Month. For purposes of this Section 6.2, "purchase price" for a Month means the market price, plus the Buying Brokerage Fee, determined prospectively (or by a methodology which is determined prospectively) for a monthly block of power having the attributes of the PFJ Block Amount for that Month, including:

(a) 100% load factor deliveries; and

(b) firmness and remedies for failure to deliver as specified in the Electricity Purchase Agreement.

6.3. **Pricing Methodology**

The initial pricing methodology for determining the Monthly Price and the ATC Price as of the Effective Date is established in Appendix 1. The Province and Powerex acknowledge that from time to time during the term of this Agreement different methods of determining the Monthly Price or the ATC Price may be appropriate to meet the Entitlement Pricing Principle or the Purchases Pricing Principle, as the case may be. No sooner than 12 Months after the Effective Date or 12 Months since the pricing methodology was last established (or at any other time by agreement of the parties), if a party believes that the then current pricing methodology (including any values established under it) will produce a price that will not meet the relevant pricing principle during the next 12 Months, the party may, by notice to the other party, seek to renegotiate the then current pricing methodology.

The parties will negotiate in good faith to establish, within 90 days of such notice, a new pricing methodology to replace the then current methodology. If the parties are unable to negotiate a new pricing methodology within such time, either party may submit the matter to dispute resolution pursuant to Section 12. Upon agreement or determination of the new pricing methodology by dispute resolution, the new pricing methodology will become effective at the beginning of the Month immediately following the 90th day after the initial notice and the parties will adjust amounts paid from that date. In no event will the parties adjust the amounts paid or payable for any period prior to the effective date of the new pricing methodology.

6.4. **Agreements on Monthly Price**

Notwithstanding any other provision of this Agreement relating to price, the Province and Powerex may from time to time agree in writing that the Monthly Price for any specified part of the Deemed Entitlement Amount will be a price, or will be determined by a pricing methodology, specifically agreed for that part of the Deemed Entitlement Amount. Such agreement may relate to any future Month or Months.

6.5. **Agreements on ATC Price**

Notwithstanding any other provision of this Agreement relating to price, the Province and Powerex may from time to time agree in writing that the ATC Price for any specified future period will be a price, or will be determined by a pricing methodology, specifically agreed for that period.

6.6. **Agreements on Transmission Cost**

The Province and Powerex may from time to time agree in writing that some or all of the Transmission Cost that exceeds the Annual U.S. Obligation

(as defined in the Entity Agreement) will be included in the determination of Net Entitlement Revenue and therefore Charged to the Settlement Account. Such agreement may relate to any future period.

6.7. **Amended Pricing Methodology to become Appendix**

Any new or amended pricing methodology for the Monthly Price or the ATC Price established from time to time pursuant to Section 6.3 will be dated and signed by the parties and attached to this Agreement as Appendix 1. Such Appendix will replace and supersede the pricing methodology stated in it to be replaced and superseded.

7. **SETTLEMENT ACCOUNT**

7.1. **Establishment of Settlement Account**

Powerex will establish an account in its books and records to which Net Entitlement Revenue from the Effective Date will be credited (or charged if negative).

7.2. **Interest on Settlement Account Balance**

The Province will pay Powerex interest on any negative balance in the Settlement Account as at the end of each Month. Interest will accrue at the Prime Rate and will be payable monthly by deduction from future positive balances in the Settlement Account. Powerex will pay the Province interest at the Prime Rate on positive balances to the extent such positive balances are not paid when required under this Agreement.

7.3. **Conversion to Canadian Dollars**

Amounts will be credited or charged to the Settlement Account as Net Entitlement Revenue in the currency of the applicable obligation. As at the last banking day of each Month, the U.S. dollar

amount of any positive balance in the Settlement Account will be converted into Canadian dollars at the Toronto noon rate posted by Powerex's principal banker.

7.4. **Payment of Positive Balance**

Powerex will pay to the Province monthly by the last working day of each Month the positive balance, if any, in the Settlement Account as at the end of the previous Month, after conversion to Canadian dollars as provided for in Section 7.3 and after deducting any interest payable pursuant to Section 7.2.

7.5. **Payment of Negative Balance**

If at any time there is a negative balance in the Settlement Account, the negative balance will represent a debt owing by the Province to Powerex. Net Entitlement Revenue credited to the Settlement Account in any future Month will be applied first to eliminate any negative balance in the Settlement Account. If at any time there has been a negative balance for more than 3 consecutive months or the negative balance is more than $10,000,000, then the Province will, forthwith pay the entire amount of the negative balance to Powerex. If it appears at any time that there will be future negative balances in the Settlement Account, the Province and Powerex will negotiate in good faith ways to reduce or eliminate future negative balances, including establishing reserves.

8. **RELATING TO THE CANADIAN ENTITY**

8.1. **Directions from Powerex**

The Canadian Entity will, consistent with its duties as Canadian Entity under the Treaty and applicable laws, comply with the directions of Powerex from time to time with respect to all matters

pertaining to the delivery of the Canadian Entitlement pursuant to the Entity Agreement; provided that Powerex will reimburse the Canadian Entity for any costs that exceed costs the Canadian Entity would in any event incur in connection with scheduling Canadian Entitlement and otherwise to perform as the Canadian Entity under the Treaty. The Canadian Entity will, at the cost and request of Powerex, take actions required to enforce the rights of the Canadian Entity under the Entity Agreement that relate to the ownership and value of the Canadian Entitlement.

8.2. **Scheduling**

The Canadian Entity will schedule deliveries of the Canadian Entitlement energy at the Points of Border Delivery as requested by Powerex or the Canadian Entity may authorize Powerex to directly schedule such deliveries. If the Canadian Entity elects to provide or accept energy in lieu of a mid-week flow change pursuant to paragraph 7 of the Canadian Entitlement Scheduling Guidelines (attached to and forming part of the Entity Agreement), Powerex will provide or accept the energy and be entitled to any return of energy and be liable for any cost for Powerex's own account.

8.3. **Timely Directions**

The Canadian Entity will request from Powerex and Powerex will in a timely way provide necessary directions to the Canadian Entity in order that the Canadian Entity may request information, provide notices and take actions required under the Entity Agreement within the time limited by that Agreement.

8.4. **Powerex to Consult**

Powerex will consult with the Canadian Entity with respect to the impact Powerex's marketing ac-

tivities may have on the Canadian Entity's operations under the Treaty. Powerex will not take actions or direct the Canadian Entity to take actions that, in the reasonable determination of the Canadian Entity, would violate any of the Canadian Entity's obligations under the Treaty or at law.

9. CANADA-BRITISH COLUMBIA AGREEMENT

9.1. Province to Consult with Powerex and Canadian Entity

The Province will:

(a) consult with Powerex and the Canadian Entity before concurring in any of the matters referred to in the Canada-British Columbia Agreement, where the matter concurred in would affect Powerex's rights in respect of the Canadian Entitlement;

(b) consult with Powerex and the Canadian Entity before making any request to Canada pursuant to the Canada-British Columbia Agreement, where the agreement sought would affect Powerex's rights in respect of the Canadian Entitlement;

(c) include Powerex and the Canadian Entity in any consultations between Canada and the Province pursuant to Section 7(1) or 7(3) of the Canada-British Columbia Agreement;

(d) request Canada to present a claim arising under the Treaty which Powerex wishes made against the United States pursuant to Section 7(2) of the Canada-British Columbia Agreement, to the extent that the claim relates to the Canadian Entitlement or Powerex's rights in respect of the Canadian

Entitlement and the Province deems the claim to be reasonable.

9.2. **No Representation as to Amount of Canadian Entitlement**

The Province makes no representation to Powerex as to the amount of capacity or energy comprising the Canadian Entitlement at any time.

10. **PROVISIONS FOR NON-DELIVERY OF CANADIAN ENTITLEMENT**

10.1. **Failure to Deliver Canadian Entitlement**

If the United States does not deliver (or is not deemed to have delivered) all or any portion of the Canadian Entitlement it is obligated to deliver during any Month, the Deemed Entitlement Amount for that Month will be reduced by the amount not delivered. Any undelivered amount which is delivered during any subsequent Month will be added to the Deemed Entitlement Amount for that subsequent Month. Any cash compensation received from the United States under the Treaty with respect to the Canadian Entitlement will be credited to the Settlement Account.

11. **LIABILITY FOR COSTS**

11.1. **Powerex Responsible**

Subject to Section 11.2, Powerex will be responsible for and will pay or reimburse the Province and the Canadian Entity for payment of any costs that the Province or the Canadian Entity may incur by reason of Powerex's election to receive Canadian Entitlement power within the United States pursuant to the Disposal Agreement and, without limitation, for any Transmission Cost that exceeds the Annual U.S. Obligation (as defined in the Entity Agreement) as provided for in the Entity Agreement; provided the Canadian Entity will not

agree to pay such amounts under the Entity Agreement or otherwise take actions that would incur such costs, unless directed to do so by Powerex.

11.2. **Saving**

If Powerex obtains written agreement of the Province with respect to payment of all or any portion of the Transmission Cost pursuant to Section 6.6, such cost will be for the account of the Province and will be included in the determination of Net Entitlement Revenue pursuant to Section 6.6.

12. DISPUTE RESOLUTION

12.1. **Disputes**

Any Dispute under this Agreement will be resolved by dispute resolution pursuant to this Section 12. For purposes of this Section 12, "Dispute" means any dispute that arises under or in connection with this Agreement and includes any failure to agree upon the Monthly Price or the ATC Price or any values that go into determining such prices.

12.2. **Senior Executives to Assist Dispute Resolution**

The parties will use reasonable efforts to settle all Disputes. In the event any such Dispute is not settled within 30 days after the date such Dispute arises, each party will within 10 days refer the matter in dispute to its Chief Executive Officer or in the case of the Province to the Deputy Minister of the Ministry of Employment and Investment or such other Deputy Minister as may be designated (the "Senior Executives"). The Senior Executives will meet within 21 days to attempt to negotiate a resolution of the Dispute. Settlement offers will not be admissible in any subsequent dispute resolution process.

12.3. **Parties may Commence Arbitration**

If the parties have not succeeded in negotiating a resolution of the Dispute within 30 days after the first meeting of the Senior Executives or if the Senior Executives do not meet within 21 days pursuant to Section 12.2, the parties will be deemed to be at an impasse and any party may commence arbitration procedures in accordance with this Section 12.

12.4. **Rules for Arbitration**

Any arbitration will proceed in accordance with the Domestic Arbitration Rules of Procedure of the British Columbia International Commercial Arbitration Centre, as they may be in force at the time of the arbitration. Unless the parties otherwise agree, any arbitration commenced in accordance with this Section 12 will be by single arbitrator.

12.5. **Arbitrator may Determine Pricing Methodology**

The parties expressly declare that the arbitrator will have the express authority to determine the pricing methodology from time to time that in the opinion of the arbitrator meets the pricing principles in Sections 6.1 and 6.2.

12.6. **Exclusive means of Resolving Disputes**

The parties declare that arbitration pursuant to this Section 12 will be the exclusive means of resolving any Dispute. The determination of the arbitrator will be final and binding.

13. **IMPLEMENTATION COMMITTEE**

13.1. **Implementation Committee to be established**

The parties will establish an implementation committee (the "Implementation Committee") for

purposes of considering issues that arise out of the performance of this Agreement.

13.2. **Meetings of the Implementation Committee**

Each party will be entitled to appoint one member of the Implementation Committee. The Implementation Committee will meet from time to time at the request of any member and in any event will meet at least once annually.

13.3. **Role of the Implementation Committee**

The Implementation Committee will consider changes in circumstances and whether such changes would, in the opinion of the Implementation Committee, warrant changes to this Agreement. The Implementation Committee's role will be advisory only and the Implementation Committee will have no authority to amend this Agreement or otherwise legally bind the parties.

14. **NO PARTNERSHIP OR AGENCY**

14.1. **No Partnership**

Nothing in this Agreement will be construed as establishing a partnership, joint venture or agency relationship among the parties or any of them. Each party will act on its own behalf and for its own benefit. No party will hold itself out as being the partner or agent of the other party under this Agreement. In particular, Powerex will not be or be construed as the agent of the Province and will be entitled to deal with the Canadian Entitlement Rights assigned to it under this Agreement as it sees fit without consultation with the Province. Any profits or losses with respect to sales of the Canadian Entitlement will be solely for the account of Powerex.

15. TERMINATION

15.1. By the Province

The Province will be entitled to terminate this Agreement and the assignments under it upon notice in writing to Powerex if Powerex:

(a) files or has filed against it any court process for protection from creditors or resulting in commencement of bankruptcy, insolvency, financial reorganization, liquidation or similar proceedings;

(b) takes or is the subject of proceedings for its winding up, dissolution or liquidation;

(c) has a secured party or a receiver, trustee or similar person take possession of or commence proceedings against substantially all of its assets;

(d) becomes bankrupt or insolvent, however evidenced; or

(e) is in material breach of this Agreement and such breach continues after the Province has given Powerex written notice of the breach and a reasonable opportunity to cure the breach.

15.2. By Powerex

Powerex will be entitled to terminate this Agreement and the assignments under it upon notice in writing to the Province if the Province:

(a) is in material breach of this Agreement and such breach continues after Powerex has given the Province written notice of the breach and a reasonable opportunity to cure the breach; or

(b) fails to pay the entire negative balance in the Settlement Account within 180 days after a negative balance has been incurred.

15.3. **Accrued Obligations**

Upon termination of this Agreement, accrued obligations and liabilities will be preserved until satisfied.

16. **MISCELLANEOUS**

16.1. **Termination of Interim Agreement**

The parties acknowledge that the Interim Entitlement Return Agreement made effective April 1, 1998 among the Province, Powerex and B.C. Hydro is hereby terminated as of the Effective Date.

16.2. **Authorized Representatives**

Each party will appoint from time to time an authorized representative with authority on behalf of the appointing party to do anything within the discretion of the party under this Agreement; provided that the authorized representative will not have the authority to amend this Agreement.

16.3. **Severability**

If any provision of this Agreement is determined to be unenforceable, that provision will be deemed severed from and will not affect the enforceability of the remaining provisions.

16.4. **Notices**

All notices required under this Agreement must be in writing and given by mail, facsimile, or in such other form as the parties agree. Each party will designate in writing a person for purpose of receiving notice under this Agreement and contact information for such person (including address and facsimile number) within 60 days of the Effective

Date. Such designation may be changed by subsequent notice.

16.5. **Governing Law**

This Agreement will be governed by and construed in accordance with the laws of British Columbia.

16.6. **Assignment**

No party will assign this Agreement or its rights under it without the prior written consent of the other parties, not to be unreasonably withheld.

16.7. **No third party Beneficiaries**

This Agreement will not impart any rights enforceable by any third-party (other than a permitted successor or assignee bound to this Agreement).

16.8. **Waiver**

No waiver by a party of any default by the other party will be construed as a waiver of any other default.

16.9. **Confidentiality**

This Agreement contains, and requires the exchange of, commercially sensitive information. The terms of this Agreement, including the pricing provisions of it and all other material terms will be kept confidential by the parties, except as the parties may agree or as required by any applicable laws, rules or regulations. If any party receives a request for this Agreement or any information exchanged in connection with it, that party will notify the other parties of the request and will take necessary steps to maintain confidentiality.

16.10. **Amendments**

The terms and conditions of this Agreement may be amended only by agreement in writing of the parties.

16.11. **Entire Agreement**

This Agreement represents the entire agreement among the parties relating to the subject matter of this Agreement and supersedes all prior negotiations and agreements, whether oral or in writing.

IN WITNESS WHEREOF the parties have executed this Agreement to be effective on the Effective Date.

PROVINCE OF BRITISH COLUMBIA

By: /s/ [Illegible]

Minister of Employment and Investment

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY in its capacity as the Canadian Entity under the Treaty

By: /s/ [Illegible]

BRITISH COLUMBIA POWER EXCHANGE CORPORATION

By: /s/ [Illegible]

APPENDIX 1

This Appendix 1 forms a part of the Entitlement Assignment Agreement among Province of British Columbia, British Columbia Hydro and Power Authority and British Columbia Power Exchange Corporation effective the 1st day of April, 1999 (the "Agreement")

1. **DEFINITIONS**

1.1. Capitalized terms used in this Appendix will have the meanings ascribed to them by the Agreement or by this Appendix, as the case may be.

1.2. In this Appendix 1, all prices and other dollar amounts are in U.S. dollars.

1.3. **DowJones Index Price**

For purposes of the calculations in Sections 2.1(a) and 2.2(a) of this Appendix 1, it is assumed that the DowJones Mid-Columbia firm price indexes are determined in the manner described in, and for the On-Peak, Off-Peak and 24-Hour periods specified in, the DowJones "Wholesale Electricity Price Indexes – Mid-Columbia", as attached to and forming a part of this Appendix 1. In the event that the index prices referred to in Sections 2.1(a) and 2.2(a) of this Appendix 1 are no longer determined in the manner described in such attachment, then notwithstanding the frequency limitation in Section 6.3 of the Agreement, if the change is material, either party may, by notice to the other party, seek to renegotiate the then current pricing methodology in accordance with Section 6.3 of the Agreement.

2. **INITIAL MONTHLY PRICING FOR CANADIAN ENTITLEMENT**

2.1. **Initial Monthly Price**

The Province and Powerex agree that as at the Effective Date, the Monthly Price for Canadian Enti-

tlement will be determined in accordance with the following pricing methodology and that such pricing methodology meets the Entitlement Pricing Principle:

(a) the average of the prices for all On-Peak hours in the Month, except On-Peak hours on Sundays or NERC holidays and except On-Peak hours during which Canadian Entitlement deliveries are curtailed, where the price for each On-Peak hour will be the lesser of:

A. the Price Cap, and

B. the daily DowJones Mid-Columbia firm index price per MW.h for On-Peak Hours for that day;

(b) minus $1.89 per MW.h;

(c) minus an amount equal to 0.01425 times the price determined in accordance with Section 2.1(a) of this Appendix 1.

2.2. **Initial ATC Pricing for Purchases**

The Province and Powerex agree that as at the Effective Date, the ATC Price for deemed purchases of the PFJ Block Amount for any Month will be determined in accordance with the following pricing methodology and that such pricing methodology meets the Purchases Pricing Principle:

(a) the average of the prices for all hours in a Month, where the price for each hour will be the lesser of:

(A) the Price Cap; or

(B) the daily DowJones Mid-Columbia firm index price per MW.h as follows:

(i) for each On-Peak hour of each day except NERC holidays or Sundays, the firm On-Peak index for that day; or

(ii) for each Off-Peak hour of each day except NERC holidays or Sundays, the firm Off-Peak index for that day; or

(iii) for each hour on any NERC holiday or Sunday, the 24-Hour firm index for that day.

2.3. **Calculation of Price Cap**

For purposes of this Appendix 1, "Price Cap" means a price for each Pricing Year that is the highest value of the following 14 values determined for the months October through March of the preceding Pricing Year and April of the Pricing Year in question:

(a) the Forward Prices for the following August, determined separately for each of the 7 months from October to April, inclusive; and

(b) the Forward Prices for the following September, determined separately for each of the 7 months from October to April, inclusive.

For purposes of this Section 2.3 of Appendix 1:

"Forward Price" means the average of the forward prices per MW.h on each trading day of the month in question for firm energy delivered at Mid-Columbia during August or September, as the case may be, as determined by Powerex pursuant to Section 2.4 of this Appendix 1.

"Pricing Year" means a year commencing April 1 and ending the following March 31.

Powerex will provide the Province each month from October through April with the values determined for that month for purposes of establishing the Price Cap.

2.4. **Forward Price**

The Forward Price will be determined from time to time by Powerex based on the forward prices Powerex uses in the normal course of its business for purchase and sale decisions, derived from third party quotations and other available market information. In the event that a third party commences daily quotations of forward prices for deliveries at Mid-Columbia, and such forward price is reliable, the "Forward Price" will be determined based on daily closing prices quoted by such third party.

2.5. **Adjustment to Values**

As at the Effective Date, the parties have agreed on the values set out in Sections 2.1(b) and (c) of this Appendix 1. Such values may be changed in accordance with Section 6.3 of the Agreement.

EXHIBIT F

[Cover and Table of Contents Omitted]

BRITISH COLUMBIA – SEATTLE AGREEMENT

THIS AGREEMENT made this 30th day of March, A.D. 1984

Between:

HER MAJESTY THE QUEEN IN RIGHT OF
THE PROVINCE OF BRITISH COLUMBIA
(hereinafter called "British Columbia")

AND

THE CITY OF SEATTLE,
a Municipal Corporation of the State of Washington,
one of the United States of America
(hereinafter called "Seattle")

Whereas the International Joint Commission (IJC), by Order dated April 28, 1982, urged British Columbia and Seattle as parties under that Order, to come to some agreement with respect to their differences over the authorized construction of High Ross Dam by Seattle which would raise the elevation of Ross Lake and thus of the Skagit River at the International Boundary from its present normal full pool elevation of 1602.5 to elevation 1725; and

Whereas by said Order the IJC considered that in the then existing circumstances Ross Lake should not be raised above its existing level provided that the City receive appropriate compensation for the loss of a valuable and reliable source of electric power in the form of High Ross Dam; and

Whereas by said Order the IJC sought the formal participation of the Governments of Canada and of the United States in order to implement any non-high dam agreement which might be reached, and toward that end established

a Joint Consultative Group consisting of representatives of the two Governments, of the Commission, and of the parties, to receive quarterly reports from the parties on their efforts to arrive at such an agreement; and

Whereas the parties have held numerous meetings, including those of their financial and technical groups since the above referenced Order of the IJC of April 28, 1982 and have reported fully to meetings of the Joint Consultative Group in June, September and December of 1982 and February, August and December of 1983 concerning their negotiations; and

Whereas the IJC, the parties and the respective Governments have concluded that an agreement between the parties should be confirmed by and be subject to a treaty between the Governments;

Now therefore the parties do hereby solemnly agree as follows:

Section 1. – Definitions

The following terms used in this Agreement or in Appendices hereto shall mean:

"Agreement" means this Agreement and its Appendices A-E.

"Normal full pool elevation" means the water level at the dam determined by means of measuring elevation above mean sea level, excluding variations due to wind and wave action on surface water and variations resulting from extraordinary flood conditions, and which in the case of Ross Lake is based on The City of Seattle Ross Dam datum for Ross Lake and in the case of Seven Mile Reservoir is based on the Geodetic Survey of Canada datum for the Seven Mile Reservoir.

"Notification" means notice in writing from the Premier of British Columbia to the Mayor of Seattle, or vice versa, of intention to discontinue certain provisions of the agreement. Such notice shall be deposited, registered and pre-

paid in the United States or the Canadian mail, as appropriate. Following mailing, such notice shall also be published in a daily newspaper of general circulation in both Seattle, Washington and Victoria, British Columbia. The notice shall be deemed to have been given upon the date of publication in Seattle or Victoria, whichever is later.

"Skagit bus" means the Diablo switchyard on the Skagit River, or its successor switchyard, which is the collection point for power from Diablo and Ross power houses on the Skagit River.

"Treaty" means the "Treaty between Canada and the United States of America relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend d'Oreille River" confirming this Agreement.

Section 2. – Term of Agreement

This Agreement will come into force on the date executed by British Columbia and Seattle and shall continue through January 1, 2066. If the Treaty has not come into force by December 31, 1984, this Agreement shall terminate on that date.

Seattle and British Columbia will jointly request the IJC to terminate its 1942 Order of Approval regarding the Ross Dam on the Skagit River, effective only upon the entry into force of the Treaty and the Agreement. Seattle and British Columbia recognize that the IJC may take such action on its own motion and agree that neither will object should the IJC so act.

Section 3. – Non-Flooding of Skagit Valley

Seattle shall not raise Ross Dam or operate Ross Lake above a normal full pool elevation of 1602.5, unless before January 1, 2061, a five-year notice of discontinuance period has commenced at the instance of British Columbia pursuant to Section 9, or a determination of material breach of the Agreement by British Columbia has been made pursuant to Section 10.

Section 4. – British Columbia to Supply Electricity

British Columbia shall supply Seattle with the electricity approximately anticipated from High Ross Dam, consisting of 37.3 average MW of firm energy, capacity based upon the difference between existing Ross Dam production and 532 MW, in the months of November through March, and capacity not exceeding 150 MW in the months of April through October, commencing January 1, 1986 and for the term of this Agreement. The specific amounts of firm energy and capacity and schedule of deliveries shall be as detailed in Appendix A, subject to modifications which may result from future discussions and mutual agreement between British Columbia Hydro and Power Authority and the Seattle City Light Department, or their successor agencies. Such schedule of deliveries shall only be excused during an event of force majeure, i.e., one beyond the control of British Columbia or which could not be avoided by the exercise of due care.

Section 5. – Seattle Payments for Electricity

Seattle shall make annual fixed capital payments to British Columbia prior to December 31 of each year beginning in 1986 to, and including the year 2020, of $21,848,000 (U.S.), which represents the annual cost that would have been incurred by Seattle through the construction of High Ross Dam. This amount will be augmented by annual payments by Seattle prior to December 31 of each year beginning in 1986 to and including the year 2065, representing the operating and maintenance expenses that would have been incurred by Seattle in the annual operation of High Ross Dam. The initial payment shall be $100,000 (U.S.), subsequent payments to change annually at the same rate as the U.S. Consumer Price Index. Although the fixed capital payments terminate in 2020, it is agreed that they shall be considered sufficient, together with the operation and maintenance equivalency payments, and the benefits of Seven Mile flooding rights,

to pay British Columbia for the delivery of electricity under Section 4 through January 1, 2066.

Section 6. – Wheeling Costs

The costs of wheeling up to 230 MW of power to the Seattle load center shall be the responsibility of British Columbia. Seattle will only be responsible for wheeling costs for capacity in excess of 230 MW. Specific wheeling arrangements shall be as described in Appendix A. British Columbia and Seattle will work in concert to achieve mutually beneficial wheeling arrangements, but in no case will the costs be at a higher rate than those paid by Seattle for similar wheeling.

Section 7. – Flooding in the United States by Seven Mile Reservoir

Seattle agrees that British Columbia may operate Seven Mile Reservoir to normal full pool elevation of 1730 feet, flooding into Washington State to a depth of approximately 15 feet until January 1, 2066, subject to the provisions of 9(D)(ii). British Columbia shall deliver to Seattle energy and capacity lost at Boundary Dam due to tailwater encroachment by the Seven Mile Reservoir in accordance with Appendix A. British Columbia shall also deliver energy as required by 9(C)(ii). British Columbia shall not raise Seven Mile Reservoir across the international boundary prior to January 1, 1986, without prior agreement with Seattle.

Section 8. – Periodic Review

At intervals of no more than ten years after coming into force of this Agreement, British Columbia and Seattle shall review the terms and conditions of the Agreement in light of all applicable circumstances in order to determine the advisability of beneficial changes. Failure to agree to any proposed change shall not be subject to the provisions of Section 10.

Section 9. – Discontinuance of Certain Obligations

A. Seattle may discontinue its obligation to make payments under Section 5, and British Columbia may discontinue its obligation to deliver capacity and energy under Sections 4 and 6 by notification. Following notification of either British Columbia's or Seattle's decision to so discontinue there will be a one-year review period during which the notification may be withdrawn unilaterally by the notifying party upon like notification. At the end of this one-year review period, if the notification is not withdrawn, a five-year notice period shall commence, at the end of which period discontinuance will become effective and the relevant obligations will end, unless notification is withdrawn by consent of both British Columbia and Seattle, or unless both agree to earlier discontinuance. Notification of intent to so discontinue may not be given prior to January 1, 1991, by either British Columbia or Seattle.

B. In the event of discontinuance initiated by Seattle, its authority to flood into British Columbia will be limited to normal full pool elevation of 1602.5 feet.

C. In the event of discontinuance initiated by British Columbia and the commencement of a five-year notice period:

   (i) Seattle may begin construction of High Ross Dam immediately and flood land in British Columbia up to normal full pool elevation 1725 feet. Full compensation to British Columbia for the duration of this Agreement for such operation will be provided for by payment for actual costs of road relocation, recreation improvements, and reservoir clearing as set forth in Appendix B, by the continued flooding of the Seven Mile Reservoir into the United States to normal full pool elevation 1730 feet and by continued contributions to and operation of the Environmental Endowment Fund.

(ii) If Seattle does not exercise its right under 9(C)(i), compensation to be provided by British Columbia to Seattle for the continued operation of the Seven Mile Project, in addition to delivery to Seattle of energy and capacity lost at Boundary Dam by tailwater encroachment, will be the equivalent of 1.05 average MW of firm energy delivered annually at Blaine.

(iii) Subject to the provisions of 9(D)(ii), British Columbia will continue to have authority to operate the Seven Mile Project at normal full pool elevation 1730 feet.

(iv) British Columbia shall return to Seattle:

(a) should Seattle opt to construct High Ross Dam, a sum of money in U.S. currency sufficient to construct High Ross Dam, and either money or replacement power sufficient to fully replace power losses to Seattle due to construction. The sum to be returned shall include only cost items specified in Appendix B, adjusted to reflect actual costs at the time construction is commenced, less the capitalized value at that date of Seattle's capital payments not made or to be made under this Agreement through the year 2020;

(b) should Seattle opt not to construct High Ross Dam, the lesser of: a sum in U.S. currency sufficient to acquire equivalent energy resources until 2066 less the capitalized value, in the year Seattle so opts, of Seattle's capital payments not made or to be made under this Agreement through the year 2020; or that sum provided in 9(C)(iv)(a).

(v) Seattle shall exercise its option either to construct High Ross Dam under 9(C)(iv)(a) or not to construct under 9(C)(iv)(b) by giving notice to British

Columbia. Seattle's notice shall include an estimate of the lesser of a sum sufficient to construct High Ross Dam or to acquire equivalent energy resources, as appropriate, less the capitalized value of capital payments not made or to be made to British Columbia, together with a schedule for construction of High Ross Dam or acquisition of alternative resources. Within three months of such notice British Columbia shall give notice to Seattle of its intention to: repay immediately, as construction costs are incurred, or on the completion of High Ross or its alternative resource; its decision to provide Seattle either money or power to replace power losses during construction; and, any objections to Seattle's estimate of British Columbia's repayment obligation. Failure to give such notice by British Columbia shall be deemed to indicate: British Columbia's agreement with Seattle's cost estimates; its repayment on the earliest repayment date; and its payment for replacement power losses in money. Notices hereunder shall be given in writing from the Premier of British Columbia to the Mayor of Seattle, or vice versa, which shall be deposited, registered and prepaid in the United States or Canadian mail, as appropriate, and shall be deemed to have been given as of the date of mailing.

(vi) Seattle shall retain the option to exercise the provisions of either 9(C)(iv)(a) or 9(C)(iv)(b) for the remaining period of this Agreement, provided that British Columbia shall retain control of funds paid by Seattle prior to such discontinuance, until following exercise of such option by Seattle, repayment is made by British Columbia in accordance with the terms of 9(C)(iv) and (v).

D. Interim remedies to Seattle shall include the following:

(i) In order that Seattle not be damaged pending the submission to and determination by the arbitration tribunal provided for in Section 10, that British Columbia has failed to discharge its obligations to deliver energy and capacity to Seattle under the Agreement, British Columbia shall take all possible measures during this Agreement to ensure that there shall be immediately transferred to Seattle from sources available to British Columbia in the United States, or exported by British Columbia to the United States, such energy and capacity as may be required to fulfill British Columbia's obligation to deliver electricity under the Agreement.

(ii) If the amounts of energy and capacity required under the Agreement are not delivered or transferred to Seattle, except during an event of force majeure, or if British Columbia does not satisfy an arbitration award under Section 10, British Columbia shall forthwith lower Seven Mile Reservoir so as not to extend across the international boundary. Upon satisfaction of British Columbia's obligations to Seattle to deliver energy and capacity under the Agreement, and payment in full of any arbitration award to Seattle by British Columbia, or by Canada to the United States under the Treaty, British Columbia may raise the normal full pool elevation of the Seven Mile Reservoir to 1730 feet.

(iii) Should the arbitration tribunal determine that British Columbia had not failed in its obligations under 9(C)(iv) or (v), had not failed to deliver power, or had not otherwise been in material breach, the tribunal may find compensation payable to British Columbia from Seattle to the extent of the electricity received by Seattle from

British Columbia sources and the loss of electricity through lowering the Seven Mile Reservoir as provided for in subparagraphs (i) and (ii) above.

Section 10. – Dispute Resolution

Disputes between British Columbia and Seattle arising out of this Agreement shall be resolved exclusively as provided in this Section. Pending any decision by a consulting board or by arbitration, the obligations of the parties shall remain effective and outstanding, including without limitation the obligation of British Columbia to deliver electricity under this Agreement.

(a) At the request of both British Columbia and Seattle, any matter may be referred to a consulting board composed of four members, two of whom shall be appointed by British Columbia and two by Seattle. A decision of a majority of the consulting board shall be final and binding on the parties. Any matter not decided by majority vote within three months of the date of submission shall be referred to the arbitration tribunal. The consulting board may not consider an allegation, or make a determination, of material breach of the Agreement.

(b) At the request of either British Columbia or Seattle, any matter may be referred for determination to an arbitration tribunal which shall decide such questions in accordance with the rules in Appendix C. All decisions of the arbitration tribunal shall be final and binding and promptly carried out by British Columbia and Seattle.

(c) If the consulting board or the arbitration tribunal deems it appropriate, it may assess an amount of compensation in either electricity or money to reimburse the complainant for any losses resulting from nonperformance under the Agreement. Upon a determination of material breach by an arbitra-

tion tribunal, the performance of obligations and consequences upon discontinuance set forth in Section 9 shall be required and imposed by such tribunal.

(d) The Governments of Canada and the United States of America shall be notified of the reference of any matter to an arbitration tribunal. Although not parties, they may appear before and make submissions to such tribunal.

(e) Copies of all documents and notices of all proceedings shall be provided to the Governments of Canada and the United States of America in the same manner and at the same time as they are provided to the parties to the arbitration pursuant to the rules contained in Appendix C.

Section 11. – Environmental Endowment Fund

British Columbia and Seattle shall establish an Environmental Endowment Fund to finance and an Environmental Endowment Commission to administer the provision and maintenance of environmental amenities and recreation facilities in the Ross Lake/Skagit Valley area, as outlined in Appendix D, to which Seattle will be the prime initial contributor.

Section 12. – Reversion of Seattle Property to British Columbia

Seattle shall convey to British Columbia, upon the coming into force of the Treaty, Lots 221 and 222, Group 1, Yale Division, Yale District, Penticton Assessment Area, but such conveyance will not adversely affect Seattle's rights under Sections 3 and 9. British Columbia shall not administer the Skagit Valley below elevation 1725 in a manner inconsistent with Seattle's exercise of rights upon discontinuance as provided in Sections 3 and 9, nor shall it divert any water of the Skagit River from its natural channel for any use other than consumptive use within the watershed of that river.

Section 13. – Agreement Report

A general description of the Agreement, as defined in Section 1 hereof, its background and its intended operation, is attached hereto as Appendix E. It is a part of the Agreement, provided that in the event of any conflict between Appendix B and Sections 1-12 hereof, the latter shall govern.

[List of Appendices Omitted]

IN WITNESS WHEREOF this Agreement has been executed on behalf of the parties by their duly authorized representatives.

On behalf of the Province of British Columbia

By:

The Honourable A.J. Brummet
Minister of Environment

By:

The Honourable G.B. Gardom
Minister of Intergovernmental Relations

On behalf of The City of Seattle

By:

Mayor of Seattle

In the presence of:

Attest:

Deputy City Comptroller

EXHIBIT H

AGREEMENT FOR THE TRANSMISSION OF SKAGIT TREATY POWER BETWEEN BRITISH COLUMBIA HYDRO AND POWER AUTHORITY AND THE CITY OF SEATTLE

This Agreement (hereinafter "Agreement") is made effective as of the 1st day of February, 1999, between British Columbia Hydro and Power Authority, a Crown corporation of the Province of British Columbia, Canada (hereinafter "BC Hydro") and the City of Seattle, a municipal corporation of the State of Washington of the United States of America, acting through its City Light Department (hereinafter "Seattle"), as follows:

WHEREAS, Seattle and the Government of British Columbia (hereinafter the "Province") entered into an agreement dated March 30, 1984, providing for, among other things, the supply of power from the Province to Seattle under the Skagit Treaty for the period January 1, 1986, through January I, 2066, unless earlier terminated by certain events (hereinafter the "Skagit Agreement"); and

WHEREAS, the Province and BC Hydro entered into an agreement dated December 3, 1985, providing for the assignment and transfer of certain benefits and obligations of the Province under the Skagit Agreement to BC Hydro, a Crown corporation of the Province of British Columbia, in certain matters relating to this Agreement; and

WHEREAS, on November 10, 1987, Seattle and the Bonneville Power Administration (hereinafter "BPA") entered into Transmission Contract No. DE-MS79-86BP92047, (hereinafter the "IR Transmission Contract"), which provided for the transmission of the amount of power to be made available from the Province to Seattle pursuant to the Skagit Agreement and for the provision of Dower to compensate for losses associated with the wheeling of such power; and

WHEREAS, BC Hydro and Seattle entered into an agreement dated November 30, 1987, providing for the method of payment for the transmission of electric power under the IR Transmission Contract (hereinafter the "Payment Agreement") for a period from January 1, 1988, until December 31, 2005, unless earlier terminated by certain events; and

WHEREAS, on November 21, 1996, BC Hydro and Seattle entered into a Temporary Agreement for Transmission of Skagit Treaty Power, which agreement was subsequently amended on June 12, 1997, and further mended on December 19, 1997 (hereinafter the "Temporary Agreement"); and

WHEREAS, on November 24, 1997 the Parties and representatives of their respective governments met and agreed to initiate discussions regarding a review of various aspects of the Skagit Agreement, as provided in Section 8 of the Skagit Agreement; and

WHEREAS, on December 11, 1997, BC Hydro and Seattle entered into an Agreement in Principle for the Wheeling of Skagit Treaty Power (hereinafter "Agreement in Principle") and agreed to negotiate in good faith definitive agreements incorporating such principles, and to diligently seek to negotiate any related agreements with BPA; and

WHEREAS, consistent with the provisions of the Skagit Agreement specifying that the Province and Seattle will work in concert to achieve mutually beneficial wheeling arrangements, BC Hydro and Seattle have determined to replace the IR Transmission Contract and the Temporary Agreement with Point-To-Point Transmission Service under BPA's Open Access Transmission Tariff and the other arrangements provided for in this Agreement; and

WHEREAS, Seattle, concurrently with execution of this Agreement, is executing a Point-To-Point Service Agreement under BPA's Open Access Transmission Tariff that supersedes and replaces the IR Transmission Contract and

extends until 2400 hours on December 31, 2005 (hereinafter the "Skagit PTP Agreement"); and

WHEREAS, BC Hydro's wholly-owned subsidiary the British Columbia Power Exchange Corporation (hereinafter "Powerex") executed a Replacement Power Sales Agreement with BPA, effective February 1, 1999, attached as Appendix A hereto;

NOW, THEREFORE, Seattle and BC Hydro (hereinafter "the Parties") agree as follows:

Section 1. Term of Agreement

1.1 This Agreement shall become effective at 2400 hours on February 1, 1999, and shall continue in effect until 2400 hours on December 31, 2005, unless earlier terminated pursuant to Section 6 or Section 10 of this Agreement.

1.2 This Agreement, when effective, will supersede the Payment Agreement and the Temporary Agreement, and the Payment Agreement and the Temporary Agreement will thereafter be of no further force or effect.

Section 2. Availability of Electric Power

2.1 BC Hydro's obligations to make power available to BPA at the Point of Interconnection specified in Exhibit C of the Skagit PTP Agreement for delivery to Seattle's load center, and Seattle's obligations to take delivery of such power from BPA and to pay BC Hydro for such power, are as specified in the Skagit Agreement (hereinafter "Treaty Power"). During the team of this Agreement, the Skagit PTP Agreement shall be used to effect:

(A) Deliveries of Treaty Power by BC Hydro, and associated losses for which BC Hydro is responsible, to the point of interconnection with BPA specified in the Skagit PTP Agreement;

(B) Deliveries of power other than Treaty Power scheduled by BC Hydro for delivery using transmission capacity in excess of Seattle's schedule of Treaty

Power deliveries under the Skagit PTP Agreement up to a maximum of 230 MW (hereinafter "Non-Treaty Power"); and

(C) Deliveries of power returned to BC Hydro by Seattle from storage behind Ross Dam.

Execution of this Agreement by BC Hydro and Seattle does not modify, in any way, their respective rights and obligations regarding power and transmission under the Skagit Agreement.

2.2 Unless otherwise specified in this Agreement, the terms and conditions of the Skagit PTP Agreement apply to BC Hydro and Seattle when using transmission on BPA's system pursuant to this Agreement.

2.3 Except for any alternate Point of Delivery and/or alternate Point of Interconnection that have been mutually agreed on by BC Hydro and Seattle on a temporary basis as provided in this Agreement:

(A) Seattle agrees not to request BPA to make any change to the terms or conditions of the Skagit PTP Agreement, including any change to the Delivery Point or Point of Interconnection specified in Exhibit C to the Skagit PTP Agreement, without obtaining the prior written consent of BC Hydro; and

(B) Seattle agrees not to consent to any change to the terms or conditions of the Skagit PTP Agreement requested by BPA, without obtaining the prior written consent of BC Hydro.

Section 3. Assignment by Seattle to BC Hydro and BC Hydro's Reassignment Rights

3.1 Pursuant to the Skagit PTP Agreement, Seattle has contracted with BPA for 230 MW of transmission capacity (hereinafter "Skagit Transmission Capacity"). Seattle hereby assigns to BC Hydro, for the term of this Agreement, all of Seattle's rights and obligations with respect to such Skagit Transmission Capacity, subject to the provi-

sions of Section 6 of this Agreement regarding revocation of such assignment by Seattle. Seattle agrees to provide any necessary notice to BPA regarding such assignment to BC Hydro.

3.2 BC Hydro intends to delegate its operating responsibilities under the Skagit PTP Agreement and this Agreement to Powerex or to a U.S. subsidiary to be formed by BC Hydro or Powerex (hereinafter "U.S. Sub"), and BC Hydro may elect to reassign its rights and obligations under the Skagit PTP Agreement and this Agreement to Powerex or U.S. Sub. Seattle hereby consents to such delegation and/or reassignment; provided, however, that BC Hydro shall not be relieved of its obligations under the Skagit Agreement, the Skagit PTP Agreement or this Agreement as a result of such delegation and/or reassignment.

3.3 BC Hydro may make monthly, weekly, daily or hourly reassignments of Skagit Transmission Capacity in excess of Seattle's schedule of Treaty Power deliveries under the Skagit PTP Agreement up to a maximum of 230 MW (hereinafter "Excess Skagit Transmission Capacity") to third parties as permitted by the Skagit PTP Agreement and BPA's Open Access Transmission Tariff, and Seattle hereby consents to such reassignments; provided that such reassignments by BC Hydro are made subject to recall if required to meet BC Hydro's Treaty Power delivery obligations under the Skagit Agreement; and provided further that such reassignments by BC Hydro are made subject to the scheduling provisions of Section 5 of this Agreement.

3.4 All other assignments or reassignments by either Party shall require the written consent of the other Party obtained in advance, which consent will not be unreasonably withheld; provided, however, that neither Party shall be relieved of its obligations under the Skagit Agreement, the Skagit PTP Agreement or this Agreement as a result of such assignment or reassignment.

3.5 BC Hydro agrees to indemnify Seattle and hold it harmless from any claim or cause of action arising from BC Hydro's assignment, and any subsequent reassignment, of transmission capacity on BPA's system pursuant to this Agreement.

Section 4. Use of Skagit Transmission Capacity by BC Hydro

4.1 All Excess Skagit Transmission Capacity under this Agreement shall be available for use by BC Hydro for deliveries of Non-Treaty Power to Seattle or to any third party or for BC Hydro's own account, subject to the conditions specified in Section 4.2 hereof.

4.2 BC Hydro shall limit its use of that portion of Excess Skagit Transmission Capacity between prescheduled Skagit Treaty Power deliveries under the Skagit Agreement and Seattle's maximum power capacity entitlement under the Skagit Agreement to energy transactions using non-firm transmission.

4.3 In using Excess Skagit Transmission Capacity, BC Hydro agrees to comply with the terms and conditions of BPA's Open Access Transmission Tariff, as such Tariff may exist from time to time during the term of this Agreement.

4.4 Except for any alternate Point of Delivery and/or alternate Point of Interconnection that have been mutually agreed on by BC Hydro and Seattle on a temporary basis as provided in this Agreement:

(A) BC Hydro agrees not to request BPA to make any change to the terms or conditions of the Skagit PTP Agreement, including any change to the Delivery Point or Point of Interconnection specified in Exhibit C of the Skagit PTP Agreement, without obtaining the prior written consent of Seattle; and

(B) BC Hydro agrees not to consent to any change to the terms or conditions of the Skagit PTP Agreement

requested by BPA, without obtaining the prior written consent of Seattle.

4.5 Designation by BC Hydro of an alternate non-firm Delivery Point or alternate non-firm Point of Interconnection under the Skagit PTP Agreement for transmission of Non-Treaty Power as provided in this Agreement shall not be considered to be a change in the Skagit PTP Agreement that requires prior consent by Seattle.

4.6 BC Hydro agrees to comply with any requirements imposed by the United States Federal Energy Regulatory Commission or any successor authority or organization, the Western Regional Transmission Association, the Northwest Regional Transmission Association, or any other Regional Transmission Association to which BC Hydro and Seattle both belong that affects the uses and/or assignments of Skagit Transmission Capacity under this Agreement.

4.7 If BPA curtails or interrupts transmission service available under the Skagit PTF Agreement to the extent that any scheduled deliveries of Treaty Power and associated losses, Non-Treaty Power or power returned to BC Hydro from storage behind Ross Dam cannot be effected, then in such event BC Hydro and Seattle agree that scheduled deliveries of Treaty Power and associated losses shall have priority over scheduled deliveries of Non-Treaty Power and power returned to BC Hydro by Seattle from storage behind Ross Dam.

Section 5. Scheduling

5.1 BC Hydro shall schedule all Treaty Power pursuant to schedules supplied to BC Hydro by Seattle. Seattle's prescheduling, scheduling and scheduling changes of desired hourly quantities of Treaty Power with BC Hydro shall continue to be made in accordance with Section 4 of the Skagit Agreement, Sections 2, 5 and 8 of Appendix A to the Skagit Agreement, and Letter of Interpretation #5 to the Skagit Agreement.

5.2 BC Hydro shall be responsible for scheduling directly with BPA all deliveries and transmission of Treaty and Non-Treaty Power and associated losses.

5.3 In the event that Seattle requests a change to its seven-day schedule of Treaty Power deliveries from BC Hydro pursuant to Section 5 of Appendix A to the Skagit Agreement, and BC Hydro determines that it can reasonably respond to such request, then BC Hydro will communicate the requested Treaty Power delivery schedule change to BPA and will request that a corresponding change to the transmission schedule be made by BPA to the extent such change can be accommodated by BPA under its Open Access Transmission Tariff.

5.4 Scheduling by BC Hydro of Skagit Transmission Capacity shall be made in accordance with BPA's transmission scheduling procedures for Point-to-Point Transmission Service as prescribed by the Skagit PTP Agreement and BPA's Open Access Same-Time Information System (hereinafter "OASIS") requirements as they may exist from time to time during the term of this Agreement.

5.5 BC Hydro shall be responsible for scheduling with any transmission provider other than BPA that is involved in affecting deliveries of: (A) Treaty Power to Seattle; (B) losses associated with Treaty Power to BPA; or (C) Non-Treaty Power.

5.6 No Treaty Power shall be delivered to Seattle's load center from any Delivery Point or Point of Interconnection other than that specified in Exhibit C to the Skagit PTP Agreement without Seattle's prior consent.

5.7 From time to time during the term of this Agreement, either BC Hydro or Seattle may request the other Party to consent to temporary changes in the Point of Delivery and/or Point of Interconnection for Treaty Power specified in Exhibit C to the Skagit PTP Agreement. If the prior consent of the other Party to the change is obtained, then power will be delivered to a mutually agreeable al-

ternate Point of Delivery and/or from a mutually agreeable alternate Point of Interconnection pursuant to this Agreement, subject to the following conditions:

(A) The Parties shall follow the scheduling procedures applicable to Treaty Power;

(B) If transmission arrangements in addition to those specified in the Skagit PTP Agreement are required to effect deliveries at the alternate Point of Delivery and/or from the Point of Interconnection, then, unless the Parties agree otherwise, the Party requesting the change shall be responsible for such additional transmission arrangements, including risk of curtailment or interruption of such additional transmission arrangements and any additional costs of transmission, including incremental losses; and

(C) Seattle shall deem BC Hydro to have satisfied its Treaty Power delivery obligations under the Skagit Agreement to the extent of such deliveries to the mutually agreeable alternate Point of Delivery and/or from the Point of Interconnection.

5.8 If delivery of Treaty Power is delayed, interrupted or curtailed due to BC Hydro's failure to follow the scheduling procedures prescribed in Section 5 of this Agreement, Seattle may elect one of the following options:

(A) BC Hydro shall arrange to make replacement power available in kind pursuant to the Replacement Power Sales Agreement between Powerex and BPA attached hereto as Appendix A; or

(B) BC Hydro shall reimburse Seattle for its actual out-of-pocket costs of securing replacement power from a third-party supplier, plus any incremental transmission costs incurred by Seattle in transmitting such power, or

(C) Seattle may file a Notice of Arbitration pursuant to Section 10 of the Skagit Agreement requesting an Arbitration Tribunal to assess an amount of compensation in either electricity or money to reimburse Seattle for any losses resulting from such nonperformance by BC Hydro.

The remedy selected by Seattle under this Section 5.8 is in addition to any other remedy Seattle may have with respect to Treaty Power deliveries as specified in the Skagit Agreement.

5.9 Each Party shall have a duty to mitigate damages and shall use all reasonable efforts to minimize any damages it may incur.

5.10 The Parties will schedule with BPA returns of power stored by BC Hydro behind Ross Dam net of Treaty Power deliveries.

Section 6. Delivery and Tagging

6.1 Unless otherwise agreed to by the Parties, arrangements for deliveries of Treaty Power by BC Hydro to Seattle under normal operating conditions shall demonstrate compliance with the following tagging requirements:

(A) The power shall be supplied firm BC Hydro's firm system supply;

(B) The power shall be tagged as "BCHA-SYS/BC" to the Point of Interconnection with BPA, provided that when BPA's OASIS allows for separate tagging of the Eastern and Western Points of Interconnection on the U.S. - Canadian Border, then the power shall be tagged as being delivered in the vicinity of Blaine at the Ingledow-Custer Interconnect;

(C) The power shall be tagged as being delivered to Seattle from the applicable Point of Interconnection referred to in Section 6.1(B), above, using firm Skagit Transmission Capacity on the BPA system;

(D) The power shall be tagged as being delivered to the Seattle load center; and

(E) The comment field of the tag shall include the reference "Skagit Power at Blaine (POR)."

A *pro forma* example of a tag that complies with these tagging requirements and reflects full assignment of the Skagit FIT Agreement by Seattle to BC Hydro is attached as Appendix C to this Agreement.

These tagging requirements shall not apply during periods of "uncontrollable forces" (as that term is defined in Section 8.1 of BPA's Open Access Transmission Tariff) on the BPA, BC Hydro or Seattle systems.

6.2 To assist Seattle in verifying that the requirements of Section 6.1 of this Agreement have been complied with by BC Hydro, BC Hydro agrees to furnish Seattle daily on the preschedule day with copies of that day's tagging information furnished by BC Hydro to BPA's OASIS in compliance with the requirements of the North American Electric Reliability Council or any successor organization or authority (hereinafter "NERC"). If during the term of this Agreement such tagging information is no longer required to be submitted to BPA's OASIS, or is not required to be submitted in essentially the same form as required as of the date of execution of this agreement, then BC Hydro will furnish equivalent information to Seattle on a daily basis in a form mutually agreeable to the Parties.

6.3 Any dispute between the Parties as to whether the tagging requirements of Section 6.1 of this Agreement have been complied with by BC Hydro shall be resolved pursuant to the dispute resolution procedures set forth in Section 10 of the Skagit Agreement. If it is determined by an Arbitration Tribunal that any failure by BC Hydro to meet the tagging requirements of Section 6.1 has resulted in a material breach of BC Hydro's delivery obligations to Seattle under the Skagit Agreement, then Seattle may, upon 30 days written notice to BC Hydro, revoke its as-

signment of Skagit Transmission Capacity to BC Hydro and terminate this Agreement. Such remedy shall be in addition to any other remedy that may be available to Seattle under this Agreement and the Skagit Agreement.

Section 7. Cost Responsibility and Payment

7.1 BC Hydro shall make payment directly to BPA of all charges billed by BPA under the Skagit PTP Agreement.

7.2 BC Hydro shall be responsible for the cost of transmission and associated losses of up to 230 MW delivered to the Seattle load center, and BC Hydro shall be responsible for associated losses above 230 MW delivered to the Seattle load center.

7.3 The Skagit PTP Agreement will not be used by Seattle for transmission above 230 MW, and Seattle shall independently arrange for such transmission. Except as provided in Section 7.2, above, and Section 7.5, below, Seattle shall be responsible for the cost of transmission above 230 MW.

7.4 BC Hydro shall be responsible for providing the Ancillary Services listed as the responsibility of the Transmission Customer in Exhibit H to the Skagit PTP Agreement.

7.5 If BPA during the term of this Agreement implements a two-part rate for transmission service under the Skagit PTP Agreement, then BC Hydro shall be responsible for the energy component of BPA's transmission rate for wheeling in excess of 230 MW, and Seattle shall be responsible for the capacity component of BPA's transmission rate for wheeling in excess of 230 MW; provided, however, that if Seattle elects a higher cost method than the Skagit PTP Agreement for wheeling in excess of 230 MW, Seattle will be responsible for the difference between the energy component of BPA's rate under the Skagit PTP Agreement and Seattle's elected rate.

7.6 Seattle shall be responsible for any Use of Facilities charges imposed by BPA for transmission of Treaty Power, and Seattle shall reimburse BC Hydro for same.

7.7 In the event that BC Hydro uses a transmission provider in addition to BPA to effect deliveries of Treaty Power to Seattle, BC Hydro shall be responsible for the costs of such transmission service.

Section 8. Loss Compensation

8.1 To compensate for losses incurred in connection with transmission service under the Skagit PTP Agreement, BC Hydro shall deliver or cause to be delivered to BPA at the Point of Interconnection specified in the Skagit PTP Agreement, at the corresponding hour 168 hours later, the amounts of electric power required by BPA pursuant to the Skagit PTP Agreement for loss compensation for all power wheeled under this Agreement.

8.2 Pursuant to paragraph 1(g)(4) of Exhibit H to the Skagit PTP Agreement, BC Hydro shall provide BPA appropriate notice of its election for BPA's Fiscal Year of the method of loss compensation specified in paragraph 1(g)(2)(C) of the Skagit PTP Agreement.

Section 9. Failure of Transmission on BPA's System

9.1 Should delivery of Treaty Power be delayed, interrupted or curtailed due to a failure of the Federal Columbia River Transmission System, Seattle may request BPA to make available equivalent amounts of replacement power at Seattle's expense pursuant to the Replacement Power Sales Agreement between Powerex and BPA attached hereto as Appendix A. Seattle shall reimburse Powerex for any amounts invoiced by BPA to Powerex for deliveries of such replacement power to Seattle pursuant to this Section 9.1, including any additional transmission costs.

Section 10. Enforcement and Dispute Resolution

10.1 For the limited purpose of any action by Seattle seeking to enforce the remedies specified in Sections 5.6(A) and (B) of this Agreement, or to collect or enforce an award of compensation by an Arbitration Tribunal pursuant to Section 5.6(C) or Section 6.3 of this Agreement, BC Hydro agrees that it will accept service of process from and be subject to the jurisdiction of the United States District Court for the Western District of Washington, and any appellate courts which have review powers over that court without waiving or prejudicing any defenses, counterclaims or setoffs BC Hydro may assert in connection with any such action by Seattle. Should Seattle obtain a fatal judgment against BC Hydro under this Section 10.1, BC Hydro further agrees that any assets or receivables it may have in the United States are subject to attachment or levy in accordance with the Federal Rules of Civil Procedure if necessary to satisfy such judgement.

10.2 Any operational issues that arise between the Parties in carrying out their respective functions under this Agreement and that are not otherwise resolved by mutual agreement will be submitted to the Operating Committee created under Section 7 of Appendix A of the Skagit Agreement (hereinafter "Operating Committee") for resolution, including but not limited to any operational issues resulting from changes made by BPA to its Open Access Transmission Tariff during the term of this Agreement.

10.3 Except as otherwise provided in this Agreement, all other disputes between the Parties arising under this Agreement shall be resolved pursuant to the procedures set forth in Section 10 of the Skagit Agreement.

Section 11. Audits

11.1 Each Party has the right, at its sole expense and during normal working hours, to examine the records of the other Party to the extent reasonably necessary to ensure that such other Party has complied with the provi-

sions of this Agreement, including but not limited to the following:

(A) If requested, BC Hydro shall provide to Seattle information supporting the daily tagging summaries regarding Treaty Power deliveries furnished by BC Hydro pursuant to Section 6.2 of this Agreement; and

(B) Seattle shall furnish to BC Hydro data supporting and quantifying any claim asserted or remedy elected by Seattle under Section 5.6 of this Agreement.

This provision for audits shall continue in effect for a period of one year after the termination of this Agreement.

Section 12. Governing Law

12.1 This Agreement and the rights and obligations of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the United States of America.

Section 13. Entirety

13.1 This Agreement constitutes the entire agreement between the Parties with respect to the matters set forth herein. Other than the Agreement in Principle, which is superseded by this Agreement, when effective, and is thereafter of no further force or effect, there are no prior or contemporaneous agreements or representations affecting the same subject matter other than those herein expressed. Except for any matters which, in accordance with the express provisions of this Agreement, may be resolved by oral agreement between the Parties, no amendment, modification or change herein shall be enforceable unless reduced to writing and executed by both Parties.

Section 14. Severability

14.1 Except as otherwise provided herein, any provision or article declared or rendered unlawful by a court of law or regulatory agency with jurisdiction over the Parties will

not otherwise affect the lawful obligations that arise under this Agreement.

Section 15. No Third Party Beneficiaries

15.1 Nothing in this Agreement shall provide any benefit to any third party or entitle any third party to any claim, cause of action or right of any kind, it being the intent of the Parties that this Agreement shall not be construed as a third party beneficiary contract.

Section 16. Non-Waiver

16.1 No waiver by any Party hereto of any one or more defaults by any other Party in the performance of any of the provisions of this Agreement shall be construed as a waiver of any other default or defaults whether of a like kind or different nature.

Section 17. Notices

17.1 Any notices under this Agreement, other than notices required in performing transmission scheduling, shall be made in writing to the representatives of the Parties designated to serve on the Operating Committee. Such notices may be delivered by facsimile or by hand. Notice of facsimile shall be confirmed by telephone on the day of transmittal.

Section 18. Right To Reopen Negotiations

18.1 Either Party, upon written notice to the other within 30 days of the occurrence of the following events, may request renegotiation of affected terms of this Agreement:

(A) BPA materially alters the terms and conditions of its Point-To-Point Transmission Service as a result of future compliance filings in Federal Energy Regulatory Commission Docket No. NJ97-3; or

(B) BPA implements Network Contact Demand Service or an equivalent new service under its Open Access

Transmission Tariff that may be used for the transmission of Skagit Treaty Power; or

(C) BPA permits Seattle to schedule Treaty Power transmission under the Skagit FTP Agreement directly with BPA, and BPA permits BC Hydro to schedule Non-Treaty Power transmission under the Skagit PTP Agreement directly with BPA (hereinafter "joint scheduling"), in which case the Parties agree to negotiate any issues which are not covered by the joint scheduling agreement set forth in Appendix B hereto, and any provisions required by BPA which are not already incorporated in Appendix B.

18.2 If a notice of request for renegotiation is submitted by a Party pursuant to Section 18.1, then the Parties agree to negotiate in good faith to amend the affected terms of this Agreement. If such renegotiations are not concluded to the mutual satisfaction of the Parties within 180 days after the date of such notice, or within such other period of time as the parties may agree, then either Party within 30 days after the close of the prescribed period may initiate the dispute resolution procedures specified in Section 10 of this Agreement. Otherwise, the terms of this Agreement will continue in full force and effect.

Section 19. Counterparts

19.1 This Agreement may be executed in several counterparts, each of which is an original, and all of which constitute one and the same instrument. **IN WITNESS WHEREOF**, the Parties, by their duly authorized representatives, have executed this Agreement. This Agreement shall not become effective as to any Party unless and until executed by both Parties.

THE CITY OF SEATTLE, WASHINGTON CITY LIGHT DEPARTMENT

By: /s/ GARY ZARKER
Gary Zarker

Title: Superintendent

Date: January 28, 1999

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

By: /s/ J.G. RODFORD for
Michael Costello

Title: President and CEO

Date: 26 January 1999

EXHIBIT I

BC HYDRO-POWEREX
ASSIGNMENT AGREEMENT

This Assignment Agreement (hereinafter "Agreement") is made effective as of the 1st day of February, 1999 between the British Columbia Hydro and Power Authority, a Crown corporation of the Province of British Columbia (hereinafter "BC Hydro"), and its wholly-owned subsidiary the British Columbia Power Exchange Corporation (hereinafter "Powerex"), as follows:

WHEREAS, the City of Seattle, a municipal corporation of the State of Washington of the United States of America, acting through its City Light Department (hereinafter "Seattle") and the Government of British Columbia (hereinafter the "Province") entered into an agreement dated March 30, 1984, providing for, among other things, the supply of power from the Province to Seattle under the Skagit Treaty for the period January 1, 1986, through January 1, 2066, unless earlier terminated by certain events (hereinafter the "Skagit Agreement"); and

WHEREAS, the Province and BC Hydro entered into an agreement dated December 3, 1985, providing for the assignment and transfer of certain benefits and obligations of the Province to BC Hydro in certain matters relating to this agreement; and

WHEREAS, on November 10, 1987, Seattle and the Bonneville Power Administration (hereinafter "BPA") entered into Transmission Contract No. DE-MS79-86BP92047, (hereinafter the "IR Transmission Contract"), which provided for the transmission of the amount of power to be made available from the Province to Seattle pursuant to the Skagit Agreement and for the provision of power to compensate for losses associated with the wheeling of such power; and

WHEREAS, on November 21, 1996, BC Hydro and Seattle entered into a Temporary Agreement for transmission of Skagit Treaty Power, which agreement was subsequently amended on June 12, 1997, and further amended on December 19, 1997 (hereinafter the "Temporary Agreement"); and

WHEREAS, on December 11, 1997 BC Hydro and Seattle entered into an Agreement in Principle for the Wheeling of Skagit Treaty Power and agreed to negotiate in good faith definitive agreements incorporating such principles, and to diligently seek to negotiate any related agreements with BPA; and

WHEREAS, BC Hydro and Seattle have determined to replace the IR Transmission Contract and the Temporary Agreement with Point-To-Point Transmission Service under BPA's Open Access Transmission Tariff and certain other arrangements, all as further specified in the Agreement for the Transmission of Skagit Treaty Power Between British Columbia Hydro and Power Authority and the City of Seattle (hereinafter "Skagit Transmission Agreement") to be effective February 1, 1999; and

WHEREAS, Seattle is executing a Point-To-Point Service Agreement under BPA's Open Access Transmission Tariff that supersedes and replaces the IR Transmission Contract effective at 2400 hours on February 1, 1999 and extends until 2400 hours on December 31, 2005 (hereinafter the "Skagit PTP Agreement"); and

WHEREAS, Powerex executed a Replacement Power Agreement with BPA, effective February 1, 1999; and

WHEREAS, BC Hydro now desires to assign its rights and obligations, and to delegate its operating responsibilities, under the Skagit PTP Agreement and Skagit Transmission Agreement to Powerex, and Powerex is willing to accept such assignment and delegation;

NOW, THEREFORE, BC Hydro and Powerex (hereinafter "the Parties") agree as follows:

Section 1. Term of Assignment and Delegation.

1.1 This Agreement shall become effective at 2400 hours on February 1, 1999. The assignment and delegation provided in this Agreement shall continue in effect until the earlier of: (a) 2400 hours on December 31, 2005; (b) the date of termination of the Skagit PTP Agreement; (c) the date of termination of the Skagit Transmission Agreement; (d) mutual agreement by BC Hydro and Powerex to terminate this Agreement, or (e) a minimum of 30 days prior notice given by BC Hydro to terminate this Agreement in the event that Powerex is no longer a wholly owned subsidiary of BC Hydro.

Section 2. Scope of Assignment and Delegation.

2.1 BC Hydro hereby assigns its rights and obligations under the Skagit PTP Agreement and the Skagit Transmission Agreement to Powerex to the extent permitted by such agreements. Powerex accepts such assignment subject to the conditions and limitations contained in such agreements.

2.2 BC Hydro hereby delegates its operating responsibilities with respect to transmission arrangements under the Skagit PTP Agreement and the Skagit Transmission Agreement to Powerex to the extent permitted by such agreements, including responsibilities for:

(A) Communications with Seattle and BPA;

(B) Scheduling;

(C) Delivery arrangements;

(D) Furnishing tagging information provided by BC Hydro to Seattle;

(E) Making payments to BPA and other transmission providers;

(F) Arranging for ancillary services;

(G) Loss compensation;

(H) Reassignments of transmission capacity to third parties;

(I) Administration of the Replacement Power Agreement;

(J) Dispute resolution; and

(K) Audits.

Powerex accepts such delegation subject to the conditions and limitations contained in such agreements.

2.3 Nothing herein shall limit or otherwise affect BC Hydro's obligations to make power available to Seattle pursuant to the Skagit Agreement.

2.4 The Parties shall develop internal accounting procedures to reflect their respective financial obligations under this Agreement, the Skagit PTP Agreement, the Skagit Transmission Agreement and the Skagit Agreement.

Section 3. Governing Law

3.1 This Agreement and the rights and obligations of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the Province of British Columbia.

Section 4. Entirety

4.1 This Agreement constitutes the entire agreement between the Parties with respect to the matters set forth herein. No amendment, modification or change herein shall be enforceable unless reduced to writing and executed by both Parties.

Section 5. Severability

5.1 Except as otherwise provided herein, any provision or article declared or rendered unlawful by a court of law or regulatory agency with jurisdiction over the Parties will not otherwise affect the lawful obligations that arise under this Agreement.

Section 6. No Third Party Beneficiaries

6.1 Nothing in this Agreement shall provide any benefit to any third party or entitle any third party to any claim, cause of action or right of any kind, it being the in-

tent of the Parties that this Agreement shall not be construed as a third party beneficiary contract.

Section 7. Non-Waiver

7.1 No waiver by any Party hereto of any one or more defaults by any other Party in the performance of any of the provisions of this Agreement shall be construed as a waiver of any other default or defaults whether of a like kind or different nature.

Section 8. Counterparts

8.1 This Agreement may be executed in several counterparts, each of which is an original, and all of which constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties, by their duly authorized representatives, have executed this Agreement. This Agreement shall not become effective as to any Party unless and until executed by both Parties.

THE BRITISH COLUMBIA HYDRO AND POWER AUTHORITY
By: /s/ J.G. Redford for M. Costello
Title: President/CEO
Date: Jan. 27/99

THE BRITISH COLUMBIA POWER EXCHANGE CORPORATION
By: /s/ [Illegible]
Title: VP-Sales
Date: Jan. 26/99

[Counsel name/address block omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Coordination Proceeding Special Title (Rule 1550(b))	Nos. CV 02-0990-JM(LAB) CV 02-1000-L(JAH) CV 02-1001-B(POR)

WHOLESALE ELECTRICITY
ANTITRUST CASES I & II

This Document relates To:

Reliant Energy Services, Inc., et al. v.
Arizona Electric Power Cooperative, Inc., et al.

Duke Energy Trading and Marketing, LLC, et al. v.
Arizona Public Service Company, et al.

Reliant Energy Services, Inc., et al. v.
Arizona Electric Power Cooperative, Inc., et al.

POWEREX CORP.'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF CROSS-DEFENDANT POWEREX CORP.'S RESPONSE TO PLAINTIFFS' MOTION TO STRIKE AND/OR SEVER CROSS-COMPLAINTS

Cross-defendant Powerex Corp. ("Powerex"), by and through its attorneys, hereby requests the Court to take judicial notice of the documents attached to this request pursuant to Federal Rule of Evidence 201. It is proper for the court to consider matters subject to judicial notice pursuant to Federal Rule of Evidence 201.[1]

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[1] *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988).

Powerex also requests that the Court take Judicial Notice of the following legislative enactments and historical documents and treaties:[3]

* * * * *

12. British Columbia Legislative Assembly, Debates (June 27, 1988), pages 5409-5459.

* * * * *

Dated: August 9, 2002

[Signature/address block omitted]

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[3] *See, e.g., Fox and Assoc., Inc. v. M/V Hanjin Yokohama*, 977 F.Supp. 1022, 1029 (C.D.Cal. 1997) (taking judicial notice of legislative enactment by foreign government); *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) (judicial notice of historical documents, including treaties, is proper).

EXHIBIT 12

PROVINCE OF BRITISH COLUMBIA

2nd Session, 34th Parliament

OFFICIAL REPORT OF

DEBATES OF THE LEGISLATIVE ASSEMBLY

(HANSARD)

Monday, June 27, 1988

Afternoon Sitting

Volume 10, Number 16

THE HONOURABLE J. D. REYNOLDS, SPEAKER

[Page 5408]

* * * * *

UTILITIES COMMISSION AMENDMENT ACT, 1988

HON. MR. DAVIS: * * *

[Page 5409]

* * * * *

The minister has stated that the government is going to create a monopoly power export company, probably a subsidiary of B.C. Hydro. At first blush I agree with that. It's the one-window approach. It means that Hydro, which has the marketing expertise, will in fact buy and sell all power in British Columbia, whether domestically or through the export agency. The problem is that I can see potentially the worst of all worlds with this bill: that is, government intervention essentially to subsidize power exports. The minister has stated in the past that he's concerned about that, but I see nothing in the bill that really comes to grips with that problem.

* * * * *

What I see happening with this new one-window approach and this bill is Hydro buying that power at 10 cents or whatever a kilowatt hour and feeding it in to its average cost – that would raise our average cost marginally from, say, 3.5 cents to 3.6 cents – and then selling it to the United States at 7 cents and claiming a profit. The minister knows that would be a hidden subsidy from British Columbia for export, because instead of using marginal cost and selling it, trying to be competitive at the margin and allowing that to be exported, there would be tremendous pressure to blend the price and sell it at average cost. I would have a great deal of concern about that, and I know that the minister has in the past talked about some concern with that.

What I see happening with energy policy in British Columbia, . . . because Hydro will now be buying all private

power and then selling essentially through the subsidiary [Page 5410] or otherwise to the United States, and the power is then backed up by the entire B.C. Hydro system, Hydro will be costing that power not at the margin, but at average cost. What that means – and this is what I'm completely opposed to – is that it would be a subsidy by domestic consumers essentially for air conditioners in California, to be a bit glib about it. With this bill, with power export companies and with B.C. Hydro's initiatives, I can see quite a significant increase of private power generation coming onstream if Hydro buys that power and then blends it with the cheap Hydro electricity that we have today. I don't want that to happen. I think there's some real problems with that. I fear there will be tremendous political pressure to do that.

In the United States, where they have promoted co-generation and private power, alternative sources of power, they've had some problems. In California, for example, the California energy commission required the utilities to buy all co-generated power. Subsequently they paid extremely high prices for that power, but then blended it in and made it an average price. It has caused a great deal of economic inefficiency in California.

I think there is a tremendous potential in British Columbia for co-generation, but if the government is going to pay fully avoided or marginal costs for that power, that will generate a lot of activity in the private sector. If it's trying to wield that power in the United States, I don't think it will be competitive in the California market, at least at this point, unless it's blended with our cheap hydroelectricity. That's why I think this bill, although it has many things to commend it, also paves the way for, not an explosion, but a significant degree of private sector power just for export, using essentially a hidden subsidy through the public sector hydroelectric dams. That's where I have a great deal of concern, and I can see that coming in terms of where the policy is moving.

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[Page 5411]

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HON. MR. DAVIS: First, I would like to address a concern expressed by the member from Vancouver East about the export of electricity. British Columbia to date has never exported electricity on a long-term basis. It has for several decades exported surplus capacity when there was a market in the United States, or indeed when B.C. Hydro and before it B.C. Electric has a surplus. There are occasions when the Americans don't need any power at all, but in recent years they've taken modest amounts in some years and very large amounts in others.

An argument has been made for always having some excess capacity in British Columbia because the excess or the surplus could be sold on a short-term basis if our own needs didn't rise as rapidly as had been forecast. It's been more a fail-safe system of selling short term. There's been a lot of talk, particularly in the last decade, of long-term sales in the United States. The opportunity still hasn't really arisen for long-term sales to be made. It will arise, I am reasonably confident, in the 1990s or certainly after the year 2000.

Unlike the situation in eastern Canada and in the Midwest, the price of electricity immediately south of British Columbia has in general been less than the average price in British Columbia. It's very difficult to export into an area where the price is less than your average cost. Those circumstances are changing; average cost in the U.S. Pacific Northwest today is roughly comparable, roughly equal to B.C. Hydro's average cost and is rising rapidly. If ever they begin to pay off the cost of incomplete nuclear power plants in the northwest, the rates in the U.S. will be well above ours, and then the opportunity genuinely does exist, at least on a price basis.

Naturally, utilities in the United States build their own capacity if they can, so there's not necessarily a market in California. Generally speaking, new power plants use oil or natural gas. The nuclear alternative now seems to have been precluded. Power from those sources is more expensive, certainly, than average costs in Canada. So long-term, there should be an opportunity to export.

The export opportunity, I think, however, should be as much as possible separated from the service to British Columbians. The service in B.C. – largely provided by B.C. Hydro, but also to a lesser extent by West Kootenay Power and others – is a monopoly-type service and must be regulated, and rates, generally speaking, are equal to average cost. In no way should we include in average costs new plants, which may be more expensive, particularly if they are built substantially to serve an export market. An export agency, I think, is desirable. It will begin its life this summer as a subsidiary of B.C. Hydro, simply because Hydro has the personnel and the expertise to do that kind of work without adding unduly to personnel.

In the longer term, I think that agency should not be seen as a child or a part of Hydro. It should deal with long-term export opportunities. The reason for creating an agency – a single marketing desk, if I can describe it that way – is merely to drive a good bargain in the U.S.A. and not have competing B.C. or Canadian projects vying with each other on the U.S. side of the line. We sell from strength, in other words.

That agency would first have to have obtained firm markets of firm contractual commitment to an income flow, and then would turn around and call for tenders in British Columbia. There will be a variety of expressions of interest. I suppose the majority would be private. It's conceivable that Hydro itself might put forward a project which is seen to be surplus for at least several decades to B.C.'s own needs but is put forward as a non-regulated

project – certainly not regulated in its service to British Columbians, but simply a project which can make a profit.

This single-desk agency would have to see a larger income from sales than the costs on the Canadian side. In other words, that operation would have to be profitable.

MR. CLARK: The margin cost?

HON. MR. DAVIS: There would have to be a distinct difference between the income side and the cost side. There would have to be a margin which was the profit from the export sale, and the totality of that operation would be external to any regulated service to British Columbians.

* * * * *

[Counsel name/address blocks omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Coordination Proceeding
Special Title (Rule 1550(b))

Nos. CV 02-0990-RHW
CV 02-1000-RHW
CV 02-1001-RHW

WHOLESALE ELECTRICITY
ANTITRUST CASES I & II

This Document relates to:

ALL ACTIONS

RELIANT ENERGY SERVICES, INC., ET AL.,
Defendants and Cross-Complainants,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-Defendants.

DEFENDANTS' JOINT NOTICE OF LODGMENT IN SUPPORT OF OPPOSITION TO PLAINTIFFS' MOTION TO REMAND AND MOTION TO STRIKE AND/OR SEVER CROSS-COMPLAINTS

TO ALL PARTIES, THEIR COUNSEL OF RECORD, AND TO THE HONORABLE COURT:

PLEASE TAKE NOTICE that defendants hereby jointly lodge the following exhibits referenced in the their [*sic*] Opposition to Plaintiff's Motion to Remand and Motion to Strike and/or Sever Cross-Complaints.

Exhibit	Title
	* * * * *
29	BC Hydro's *Report on Electricity Trade*, dated June 30, 2000.
	* * * * *

DATED: August 12, 2002

[Signature/address block omitted]

EXHIBIT 29

BC hydro THE POWER IS YOURS

REPORT ON EXPORT TRADE

30 June 2000

1. The Structure of Agreements between BC Hydro and Powerex

(i) Consolidation of Powerex's revenues for revenue requirements purposes

Under Special Direction No. 8 as amended by an Order in Council dated March 30, 2000, the Commission is required to ensure electricity rates are sufficient to allow BC Hydro to achieve an annual rate of return on equity equal to the return allowed, on a pre-income tax basis, by the most comparable investor-owned utility regulated under the Utilities Commission Act.

Special Direction No. 8 requires that for rate setting purposes, the return on equity must be calculated using consolidated net income from all sources. For this purpose, projections of consolidated net income must include "an amount of electricity trade income consistent with the Commission's forecast of annual net export revenue under average water conditions, as contained in the Commission's report to the Lieutenant Governor in Council dated June 30, 1992, as amended on BC Hydro's Energy Removal Certificate application". Where projected consolidated net income, before any Rate Stabilization Account transfers, is less than the amount needed by BC Hydro to achieve its allowed rate of return, projections are also to

include an allowance for an appropriate transfer from the Rate Stabilization Account. Transfers from the Rate Stabilization Account are subject to a positive balance existing in the account.

BC Hydro uses Generally Accepted Accounting Principles (GAAP) to consolidate its subsidiaries, including Powerex. Under GAAP, subsidiaries are consolidated with their parent company on a line by line basis and any inter-company profit is eliminated on consolidation. The result shows consolidated net income resulting solely from transactions with external third parties. The transfer pricing applied between BC Hydro and Powerex thus has no relevance in determining BC Hydro's rates at this time.

Since consolidated net income is used for rate setting purposes, the optimization of electricity trade income benefits domestic ratepayers by reducing the portion of the revenue requirement that must be collected through domestic rates. Moreover, where water conditions and electricity trade activities lead to an overearning relative to the allowed return on equity, ratepayers benefit from this through the Rate Stabilization Account as described in more detail below.

(ii) Nature of Transactions with respect to electricity trade between BC Hydro and Powerex

BC Hydro's primary objective is to provide low-cost, reliable electricity supply to domestic customers. Within this context, Powerex's activities are designed to support optimal economic utilization of BC Hydro's electricity assets by using non-committed generation capability to earn income.

Powerex deals with BC Hydro as both a transmission user and to assist in optimizing utilization of system capability. With respect to arrangements

for wholesale transmission service, both for itself and for the Power Supply business unit ("Power Supply") within BC Hydro, Powerex deals with BC Hydro's grid operations personnel as it would a third party. Pursuant to the WTS tariff provisions, grid operations has adopted strict codes of conduct and procedures to ensure that Powerex and Power Supply and BC Hydro's customer services business units are treated as third parties.

On the other hand, when it comes to the optimization of the generation assets, Powerex's relationship with Power Supply is intended to be very close. Indeed a conscious effort is made by Powerex and Power Supply to share information and co-operate closely to ensure maximum efficiency and profitability in BC Hydro's operation of its system. Because Powerex is a separate legal entity, the extra-provincial regulatory and income tax implications of Powerex's external activities can be managed for the benefit of BC Hydro as a whole. In addition, this framework has allowed Powerex to develop a trading group that can focus on mastering the rules and characteristics of markets external to B.C.

While energy transfers between BC Hydro and Powerex are accounted for as transactions between separate legal entities, various communication and coordination processes ensure that transactions are beneficial from a corporate-wide perspective. Similarly, BC Hydro's commodity risk management policies and processes are integrated to ensure that the generation assets are used to ensure both adequate supply to domestic customers and optimum use of system capability.

Energy transactions between BC Hydro and Powerex are solely sales and purchases of energy. Powerex has no storage rights or water inventory.

These energy transactions result from BC Hydro's desire to maximize energy generation when its value is high and to minimize energy generation when its value is low. This means ensuring there is sufficient energy and capacity to meet BC Hydro domestic load and optimizing BC Hydro generation for trade, subject to physical and environmental constraints and considering the long-term value of energy in the reservoirs.

In order to maximize value and manage risks, Powerex allocates sales and purchases along three dimensions – geographic, time and market channels. There are three significant markets in which Powerex transacts: Alberta, the U.S. Pacific Northwest and California. The decisions with respect to buying and selling energy in each region are based on the actual and expected market prices and demand for energy in each market, cost and availability of transmission to reach each market, and the risk of transmission curtailments.

Time allocation means allocating sales and purchases among the Real Time market, the next-day market, and the forward market. These allocation decisions are based on the actual and expected market prices and demand for energy, and risk-adjusted forecasts of the BC Hydro generating capability and transmission that will be available in each time period. Because the forward market prices can be quite volatile and because of the nature of BC Hydro's system, Powerex can take advantage of this volatility in its forward sales and purchases. A key factor affecting the time allocation decisions is that, because of limited liquidity, no one market can absorb all the power available to sell.

Allocating among different market channels means selecting the best markets to transact in for a par-

ticular geographic area and time period. For example, in the day-ahead market at the California-Oregon border (COB), Powerex can transact in both the bilateral market with other utilities or marketers, or in the California Power Exchange's (Cal PX) day-ahead market. In the hourly market, Powerex can transact in the bilateral market, the Cal PX hour-ahead market, or the California Independent System Operator (Cal ISO) imbalance energy market. Another alternative is the market for structured or complex deals, which include value-added customer benefits that yield higher margins for Powerex than straight commodity sales. Such benefits include delivery to a customer's site, or re-marketing rights in the event that a customer's load unexpectedly drops. Powerex makes these decisions based on the expected price and demand for energy in the different markets within limits established in BC Hydro's risk management policy described below.

Powerex and Power Supply work together in a process that is both cooperative and iterative. Power Supply determines the net capability of the BC Hydro system to deliver and/or receive power at the B.C. border ranging from real-time to several years forward. Power Supply also establishes the system marginal value of generation (which is influenced primarily by the forecast forward electricity and gas market prices as well as probability of spill and efficiency of water use). Powerex seeks to buy below and sell above this value so as to maximize the net revenue from electricity trade. Information provided by Powerex on forecast market price, market depth, and expected transmission capabilities is important to Power Supply in the determination of this system marginal value. Detailed forecast reservoir energy storage data and

the marginal value of generation are commercially sensitive information.

Information about BC Hydro's generating capability and value drives Powerex's trading strategy. Information about market opportunities is considered in BC Hydro's plant operating decisions and the scheduling of maintenance. Power Supply and Powerex share information continuously for the purpose of optimizing trading on a Real Time or hour-to-hour basis, over the period including the next day and month, and for the period from one month to two years. Information is shared for longer-term opportunities as these opportunities arise.

(a) Real Time

Hour-to-hour coordination takes place between the BC Hydro operations shift engineer and the Powerex Real Time trader, who work in close proximity to one another on the Powerex trade floor. The Powerex trader identifies market opportunities to buy or sell power. The BC Hydro operations shift engineer determines the amount of generating capability that is available for trade after BC Hydro's power and non-power obligations have been met, and the value of this generation. Based on this information, the Powerex trader will make buy or sell decisions for the next hour.

(b) Short Term

The Power Supply next-day operations planners seek input from the Powerex traders on expectations of market prices and quantities for imports and exports and then provides a system capability for sales and purchases from the BC Hydro system. In determining system capability, priority is always given to serving do-

mestic load. The Powerex trader uses this information to engage in purchases and sales and the BC Hydro operations planners use the information to plan short-term maintenance outages. If, for example, market prices are expected to be high, BC Hydro could accelerate, re-schedule or cancel a generation maintenance outage.

(c) Medium Term

For the next day to three-year period, Powerex provides BC Hydro generation and operations planners with forward market prices and expectations of market demand. BC Hydro generation and operations planners provide Powerex with the value of energy in the BC Hydro system and the amount of generation capability that is available each month for trade. These are based on forecasts of the availability of hydroelectric and thermal energy in the system, BC Hydro's load, and the generation outage schedule.

(d) Long Term

All energy transactions of a duration in excess of three years require the specific approval of the Risk Management Committee and/or the BC Hydro and Powerex Boards. Powerex relies on Power Supply to advise on and review any long-term contracts contemplated by Powerex. Contracts with terms over five years also require separate provincial government and National Energy Board approval under the terms of trading authorizations issued to BC Hydro and Powerex.

Power Supply relies on Powerex to advise on and review any long-term contracts contemplated by Power Supply. In addition, Power

Supply and Powerex work together to execute such contracts. An example of such a long-term Power Supply contract is the Non-Treaty Storage Agreement.

The preceding paragraphs refer to system trading; this trading is enabled by or is an important adjunct to, the BC Hydro generation system. In addition to this activity, Powerex engages in a very limited amount of forward hub trading and locational arbitrage. Forward hub trading means buying or selling forward physical blocks of energy, or options on blocks of energy, with a view to profit from changes in prices. Locational arbitrage means buying energy at one point, buying transmission to another point, and selling energy for a profit. These activities are independent of the BC Hydro system but provide valuable market knowledge and price discovery information.

(iii) Policies, agreements and protocols between BC Hydro and Powerex

The activities between BC Hydro and Powerex are subject to a management framework of governing principles, policies, agreements, and working protocols. The primary components of the framework are:

- BC Hydro Commodity Risk Management Policy – with respect to Powerex
- BC Hydro/Powerex Energy Transfer Pricing

(a) BC Hydro Commodity Risk Management Framework

In early 1997, BC Hydro engaged the consulting firm Deloitte & Touche as part of a two-year project to enhance its risk management capability. The objective of the project was to meet or exceed industry best practices for risk

management. The work of the consultants, with significant contributions from BC Hydro and Powerex staff, culminated in the creation of the BC Hydro Commodity Risk Management Policy – with respect to Powerex ("the Policy") and related infrastructure. The Policy was approved by the BC Hydro Risk Management Committee (RMC) in the fall of 1999. The Policy was approved by the Powerex Board of Directors and by the BC Hydro Board of Directors in December 1999. The Policy has now been implemented within BC Hydro and Powerex.

The Policy has also been reviewed and endorsed by government. In June 2000, BC Hydro and Powerex were designated as government bodies that have been approved to trade in commodity derivatives pursuant to section 79.3 of the *Financial Administration Act*.

* * * * *

[Counsel name/address block omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Coordination Proceeding
Special Title (Rule 1550(b))

Nos. CV 02-0990-RHW
CV 02-1000-RHW
CV 02-1001-RHW

WHOLESALE ELECTRICITY
ANTITRUST CASES I & II

This Document relates To:

Reliant Energy Services, Inc., et al. v.
Arizona Electric Power Cooperative, Inc., et al.

Duke Energy Trading and Marketing, LLC, et al. v.
Arizona Public Service Company, et al.

Reliant Energy Services, Inc., et al. v.
Arizona Electric Power Cooperative, Inc., et al.

DECLARATION OF VALERIE LAMBERT IN SUPPORT OF BRITISH COLUMBIA HYDRO AND POWER AUTHORITY'S MOTION TO DISMISS

I, Valerie Lambert, declare as follows:

1. I have personal knowledge of the facts contained in this Declaration, except for those matters stated on information and belief, as to which I believe them to be true. If called as a witness, I could and would competently testify to all of the facts stated herein.

2. I am Treasurer of British Columbia Hydro and Power Authority ("BC Hydro").

3. BC Hydro acts as the treasury for Powerex and facilitates the issuance of letters of credit in support of Powerex's commercial arrangements.

4. BC Hydro's borrowings and other fiscal arrangements are provided through, and therefore supported by, the Provincial Government. As a result, BC Hydro maintains a credit rating equal to that of the Province. Powerex's commercial arrangements, in turn, are frequently supported by a guarantee from BC Hydro, thus providing Powerex the benefit of BC Hydro's credit rating, which in turn reflects the Provincial Government's guarantee of BC Hydro's debt.

5. Consistent with the requirements of Canadian generally-accepted accounting principles, the financial statements of BC Hydro include all of the revenues and costs associated with the operations of its wholly-owned subsidiaries, including Powerex, subject to normal intercompany eliminations on consolidation.

6. Powerex's earnings are consolidated with those of BC Hydro for purposes of establishing BC Hydro's rates. In determining the rates BC Hydro may charge its customers, the BC Utilities Commission takes into account the contribution anticipated from Powerex due to its export earnings, and reduces BC Hydro's rates accordingly. The benefits of Powerex's export trade activity are passed through to the Provincial Government through the consolidation of Powerex's earnings into the net income of BC Hydro and the requirement that, whenever its debt equity ratio would not drop below certain specified levels, BC Hydro pay approximately 85% of its consolidated net income to the BC Government annually.

7. Dividends from the operations of BC Hydro are payable only to the Province. BC Hydro does not pay Canadian federal or Provincial income taxes.

8. BC Hydro conducts no business in California.

9. To the best of my information and belief, BC Hydro has never had offices in the United States, does not maintain possession of any records or documents in the United States, and does not have any employees in the United States.

10. To the best of my information and belief, BC Hydro has never designated an agent for service of process in the United States.

11. To the best of my information and belief, BC Hydro has never availed itself of courts in the State of California, and has never sought relief from courts located within the State of California.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I executed this Declaration on the 22nd day of August 2002, at Vancouver, British Columbia.

/s/ VALERIE LAMBERT
VALERIE LAMBERT

[Counsel name/address block omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Coordination Proceeding
Special Title (Rule 1550(b))

Nos. CV 02-0990-JM(LAB)
CV 02-1000-L(JAH)
CV 02-1001-B(POR)

WHOLESALE ELECTRICITY
ANTITRUST CASES I & II

This Document relates To:

Reliant Energy Services, Inc., et al. v.
Arizona Electric Power Cooperative, Inc., et al.

Duke Energy Trading and Marketing, LLC, et al. v.
Arizona Public Service Company, et al.

Reliant Energy Services, Inc., et al. v.
Arizona Electric Power Cooperative, Inc., et al.

DEFENDANTS' SUPPLEMENTAL JOINT NOTICE OF LODGMENT IN SUPPORT OF SUPPLEMENTAL OPPOSITION TO PLAINTIFFS' MOTION TO REMAND AND MOTION TO STRIKE AND/OR SEVER CROSS-COMPLAINTS

TO ALL PARTIES, THEIR COUNSEL OF RECORD, AND TO THE HONORABLE COURT:

PLEASE TAKE NOTICE that defendants hereby jointly lodge the following exhibits referenced in the their [*sic*] Supplemental Opposition to Plaintiff's Motion to Remand and Motion to Strike and/or Sever Cross-Complaints.

Exhibit	Title
	* * * * *
3	Deposition transcript of Valerie C. Lambert, dated August 27, 2002
4	Deposition transcript of Kenneth Grant Peterson (Volume 1, pages 1-113), dated August 21, 2002
5	Deposition transcript of Kenneth Grant Peterson (Volume 2, pages 114-197), dated August 22, 2002
	* * * * *

DATED: September 4, 2002

[Signature/address block omitted]

EXHIBIT 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Coordination Proceeding — No. CV 02-0990-RHW
Special Title (Rule 1550(b))

WHOLESALE ELECTRICITY
ANTITRUST CASES I & II

This Document relates to:

ALL ACTIONS

DEPOSITION OF VALERIE C. LAMBERT

Tuesday, August 27. 2002

* * * * *

[3]

* * * * *

VALERIE C. LAMBERT

called as a witness by the Defendants, who, having been first duly sworn, was examined and testified as follows:

* * * * *

[8]

* * * * *

Q. The Risk Management Committee is a committee of BC Hydro though, right?

A. It's a committee of BC Hydro executives and Powerex.

Q. But to which company does it belong?

A. It's actually a committee of what they call the Chairs Committee of BC Hydro. And that's actually a recent organizational change within BC Hydro. We've [9] gone to a line-of-business structure, and there's representation from the lines of business. And the Chairs Committee actually oversees the RMC, and the CEO of Powerex is on the Chairs Committee, so it's a subcommittee of that.

Q. Of the Chairs Committee.

A. That's right, um-hm.

* * * * *

[25]

* * * * *

Q. As I understand it, the treasury group at [26] BC Hydro performs a treasury function for Powerex; is that right?

* * * * *

A. Certainly Powerex – in that Powerex does not have departments that cover off certain functions, they've got various arrangements with BC Hydro to provide those services for a fee. So there are examples of those throughout – for example, legal services from time to time they may avail themselves of, or system support, or treasury, as we've said; and in other administrative areas they will utilize BC Hydro's resources. And that, of course, will be compensated at market rates.

Q. And then that compensation is netted out when the financial statements of the two companies are consolidated?

A. Yes. I mean, Powerex's – I mean, clearly those would be costs in Powerex's financial statements, but once they are consolidated, intercompany transactions would be eliminated, yes.

Q. You mentioned treasury and legal and systems. Are there other areas where BC Hydro performs administrative functions for Powerex?

[27] A. There's – they conduct the accounts payable service on behalf of Powerex, and also I believe they produce payroll.

Q. I thought that I was quoting your declaration earlier and I actually wasn't, so just turn back – could you look at paragraph 3 of your declaration, which I believe is Exhibit 2.

What you actually said there was:

"BC Hydro acts as the treasury for Powerex . . ."

Could you explain what you meant by that?

A. Well, in that BC Hydro performs treasury activities for Powerex because they don't have a designated treasury department of their own.

Q. And what are treasury activities?

A. Things like cash management, for example, is probably the most significant one.

Q. Can you describe for us what you mean by cash management?

A. Powerex, as do the other subsidiaries of BC Hydro, retains its own bank accounts. And we utilize a centralized cash-management system within BC Hydro and its subsidiaries. So the – what that does is actually creates efficiencies between the bank balances, for example, overnight.

[28] If one company were in overdraft and another company had a positive balance, the bank basically performs a mechanical process each night to make sure that they don't charge excessive interest to the group of companies as a whole.

So we're quite active in managing that process.

Q. Do you use sweep accounts?

A. No, no.

Q. So rather than using sweep accounts, the bank looks at the balances in the accounts of the various subsidiaries of BC Hydro and BC Hydro itself?

A. That's right, that's right.

Q. And it won't charge whatever fees might be associated with overdraft if there is money to cover in other accounts?

A. That's right. At the concentration level it would actually net those out.

Now, in that there is no sweep, an overdraft, for example, that existed overnight for one of the subsidiaries would attract the appropriate cost, and that would be allocated, again, as part of that overall management system.

Q. When you said "attract the appropriate cost," you meant there would be an intercompany cost –

A. For example, overdraft interest, that's right.

[29] Q. So Powerex has its own bank accounts.

A. Yes, that's right.

Q. But people within the treasury at BC Hydro manage the accounts for them, for Powerex?

A. I don't view it as managing Powerex's accounts per se. We don't have targets with regard to Powerex's bank accounts. What we do is, again, just create as much efficiency in a consolidated sense as we possibly can.

But Powerex – they write their own checks, they prepare their own wires, they are quite independent in that sense.

Q. But they don't do their own payroll, Powerex doesn't.

A. Well, again, Hydro provides a service. But it's the same as an external service would be in that payroll isn't second-guessing Powerex or questioning whether or not that's appropriate or that type of thing. They're not directing the process at all, they're simply providing a service center-type function.

* * * * *

[30]

* * * * *

Q. . . . The money that Powerex makes gets to BC Hydro at some point in the course of the year, right?

A. Not necessarily.

Q. How does it work?

A. The consolidation is an accounting process, it's not a cash process at all. The only way that retained earnings of Powerex would find their way to BC Hydro would be through the declaration of a dividend that was at the pleasure of the Powerex board of directors.

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[32]

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Q. In order to engage in its trading activities, does Powerex use credit support from BC Hydro?

A. Yes, it does.

Q. And does the treasury group at BC Hydro manage that credit support?

A. We certainly facilitate the granting of credit support.

Q. BC Hydro issues guarantees on behalf of Powerex; is that correct?

A. That's correct.

[33] Q. And it also, if I use the language correctly, facilitates the issuance of letters of credit for Powerex; is that correct?

A. That is also correct.

Q. Are there any other ways in which BC Hydro provides credit support for Powerex?

A. No.

Q. Okay. Let's start with guarantees, then.

Who makes the decision about whether to provide a guarantee to a counterparty?

A. The initiator would be Powerex. Typically what would happen is that they have communication that suggests a guarantee is required by a counterparty. So they would bring it to the attention of BC Hydro, and we in treasury would then prepare documentation for the Province that would state the situation and the requirement.

And then the BC Hydro Treasury Department would communicate directly with the Province and a determination would be made that that was an appropriate guarantee to write. And then it would be signed off by appropriate officials both in Hydro and in the Province.

Q. When you said "a determination would be made," who would make the determination?

A. First of all, Powerex would make a [34] recommendation. At various steps, if somebody thought it was a really bad idea, I think that would get communicated broadly.

Hydro – we will look at it in the Treasury Department and determine whether or not it's an appropriate guarantee to issue.

The Province, for their part, would have a similar process. I mean, clearly they're monitoring the amount of guarantees that are issued by the Crown.

And it basically is that type of iterative process. If there was a concern raised at any of those levels, then I think that it would certainly be dealt with.

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[37]

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Q. Can you explain for us how Powerex uses letters of credit?

A. Again, it's a form of credit support issued on behalf of the counterparty. And letters of credit are used much less frequently than guarantees. And, again, that's because of the cost involved. The letter of credit – the actual process itself is very similar to what I've described with respect to the guarantees.

Q. The internal process of whether to issue a letter of credit or not.

A. That's right, that's right.

Q. "Internal" meaning Powerex, BC Hydro, the Province?

A. The Province, that's right.

Q. Unfortunately we don't have a copy of any letters of credit here today. Could you just briefly describe what the letter of credit looks like?

[38] It's issued by the bank; is that right?

A. What there is, the first document is an indemnity. And basically what that does is Powerex and BC Hydro would indemnify the bank. So to the extent that a counterparty forced a draw that the bank had to make good on, the bank would then have the right to go to Powerex for satisfaction and then, in turn, to BC Hydro if that didn't work out.

So it's a different process than the guarantee process by virtue of the involvement of the bank.

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[40]

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Q. Powerex's CFO and BC Hydro's CFO are the same person, correct?

A. That's right.

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[71]

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Q. Did BC Hydro coin the term "risk-management policies"?

A. No, they did not.

Q. Did it coin the term "risk management committee"?

A. No, absolutely not.

Q. Have you heard of such things in other enterprises?

A. Yes.

Q. Does it have a generally accepted meaning?

A. Certainly within the energy industry it's got a fairly generally accepted meaning now.

Q. So other energy companies also have risk-management policies?

A. Yes.

Q. And risk management committees?

[72] A. Yes.

Q. And is that true of both privately- and publicly-held companies?

A. Yes, it is.

Q. Are you aware of other situations where, in the energy industry, the parent company sets risk-management policies for operating subsidiaries?

A. Yes, I am.

Q. Are you aware of other situations where, in the energy situation, a parent company will have a risk management committee which then forces or modifies those policies as to subsidiary operating entities?

A. Yes, I am.

Q. Based on your experience in the industry and your knowledge of BC Hydro's risk-management policies, is there anything about them which you consider particularly unusual as compared to the risk-management policies you're aware of at private energy companies?

* * * * *

[A.] No.

[Q.] Based on your experience in the industry and your experience at BC Hydro, is there anything that you consider particularly unusual about the Risk Management Committee that exists at [73] BC Hydro versus similar committees in private companies?

* * * * *

[A.] No.

[Q.] Based on your experience in the industry and at BC Hydro, is there anything unusual about the functions performed by the Risk Management Committee at BC Hydro versus the risk management committees at private companies?

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[A.] No.

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Q. Are the financial guarantees approved by the Province itself?

A. Yes, they are.

Q. That's the guarantees issued by BC Hydro.

[74] A. That's right.

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EXHIBITS 4 & 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Coordination Proceeding Special Title (Rule 1550(b))

No. CV 02-0990-RHW

WHOLESALE ELECTRICITY ANTITRUST CASES I & II

This Document relates to:

ALL ACTIONS

DEPOSITION OF KENNETH GRANT PETERSON

Wednesday-Thursday, August 21-22, 2002

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[4]

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KENNETH GRANT PETERSON

called as a witness by the Defendants, who, having been first duly sworn, was examined and testified as follows:

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[11]

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Q. Is it common for Powerex to hire employees from BC Hydro?

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[A.] In the early period of Powerex's existence, Powerex's employees were, in fact, BC Hydro employees.

From 1993 on, all Powerex employees are directly employed by Powerex. From time to time folks have been hired from BC Hydro to join Powerex.

[Q.] Just so I make sure I understand that, so from 1988 to 1993 people who were working for Powerex – which then had a different name – were actually employed by BC Hydro?

A. Correct.

Q. And so their paychecks came from BC Hydro?

A. Yes. And, as a matter of efficiency, they [12] continue to do so. BC Hydro acts as payroll agent for Powerex to this day.

* * * * *

Q. How did the Provincial government create Powerex?

A. There were a series of policy discussions between BC Hydro and the Provincial government over changes in the energy landscape at the time, policy discussions in which I participated.

The genesis of the creation of Powerex was the preparation of a Cabinet submission, in which I was involved, proposing that an export agency of the government be created. And the government directed that be done through BC Hydro by incorporating a subsidiary into the Company Act.

Q. And you were directly involved in these discussions?

A. Yes.

Q. Was it your understanding at the time that despite having been created – despite having been [13] created

through BC Hydro, that Powerex's predecessor was intended as an export agency of the government?

A. Yes, it was an initiative of the government.

Q. And the government directed that it be created through BC Hydro?

A. Correct.

Q. And is it your understanding today that Powerex is intended as an export agency of the government?

A. Yes.

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[18]

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Q. Did the government consider any other vehicles for marketing this power?

A. Yes, it did.

Q. What else did it consider?

A. It considered two alternative marketers, neither of which are in business today. One of them was Enron, and the other was – well, I guess Puget, Duke, Dreyfuss is still in business, but not under that framework.

Q. And are you aware of the reasons that Powerex was chosen?

A. Yes.

Q. Can you tell me what they were?

[19] A. The superior knowledge of the hydroelectric system in British Columbia and the Pacific Northwest, and mastery of all the details of the Treaty. And that was felt to outweigh perhaps some of the commercial advantages that the other competitors might have brought to the table.

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[27]

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Q. Could you explain why Powerex was concerned about political risk?

A. There was a political firestorm created in British Columbia when California stopped paying its bills under Cal ISO and Cal PX tariffs. Power had been [28] delivered out of an energy-short circumstance in BC, and up to $300 million was not forthcoming and remains in California to this day.

Q. And why was Powerex concerned about political risks?

A. Well, Powerex, as a subsidiary of BC Hydro, as an agent of the government, is in the public eye. And the kinds of tensions that can be created publicly by these events can create difficulties for normal course of business.

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Q. Did the political risks to British Columbia [29] affect the prices that Powerex charged CDWR?

A. To the extent that they had to be reflective of our best estimate of the market value, yes. We were being importuned by California to bail them out, and the prevailing sentiment in BC was "only if you can get full value for it."

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[31]

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Q. What was your understanding about what the Provincial government's concern was about the fact that Powerex was selling to California when it was net short?

[32]

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[A.] The concern was two-fold. One was power had been sold without money being received, and we were well into the beginning of what would – what was, even in late fall of 2000, looking like one of the very low water periods in the Pacific Northwest and Canada.

And the Provincial government representatives, because this was a popular story in the press, were continually questioned by their constituents as to why an agency of the Crown was continuing to sell power into California.

[Q.] Were there concerns that Powerex wouldn't be able to purchase enough power back to satisfy British Columbia's citizens' needs?

A. Yes.

Q. And were there concerns about the price at which Powerex would be able to purchase power to satisfy British Columbia's needs?

A. Yes.

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[36]

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[Q.] Mr. Bell is the chair of BC Hydro; is that right?

A. Correct.

Q. And he's also the chair of Powerex?

A. Correct.

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[37]

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Q. Okay. BC Hydro appoints the Powerex board, correct?

A. Not BC Hydro per se. The BC Hydro directors do.

Q. Excuse me. So the BC Hydro board of directors [38] appoints the Powerex board of directors.

A. Correct.

Q. Is there any difference in the way that outside and inside directors are appointed to the Powerex board?

A. Yes. There is one outside director on the Powerex board who is not on the BC Hydro board, and he was appointed at the recommendation of the Powerex board to the Premiere's Office. So it wasn't a direct appointment by the government.

Q. It was not a direct appointment by the government?

A. Not by the government per se. The other directors were, and these directors recommended to the Premiere's Office that Mr. Bob Fairweather be added to the roster of Powerex directors.

Q. So – I'm sorry. So are other outside directors of Powerex appointed by the Premiere's Office?

A. Mr. Fairweather is the only outside director of Powerex that is not also a director of BC Hydro.

Q. Are the – are BC Hydro officers who are on Powerex's board considered inside or outside directors?

A. They would be considered inside directors.

Q. Are there any officers or employees of Powerex that are also officers or employees of BC Hydro?

A. No – well, yes, there is one. Mr. Bob Elton, [39] who is the chief financial officer, who was hired by Powerex in December of 2001, was appointed I believe in March 2002 to the dual role of CFO for Hydro as well as CFO of Powerex.

Q. What's your understanding of what the purpose is of having BC Hydro board members sit on Powerex's board?

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[A.] Well, my understanding is that's the way the government effects its governance responsibilities for BC Hydro and its subsidiaries.

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[42]

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Q. Ms. Watson is the corporate secretary for both Powerex and BC Hydro; is that right?

A. Correct.

Q. And Ms. Lamming is the assistant secretary for both companies?

A. Correct.

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[44]

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Q. Who's Wayne Cousins?

A. He's a corporate communications officer for BC Hydro.

Q. Is he authorized to speak on behalf of Powerex?

A. For – as I mentioned earlier, for matters of convenience, the communications and government relations for the BC Hydro family of companies is handled centrally through Corporate Communications.

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[46]

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Q. For purposes of exports from the Province, does BC Hydro have any other conduit other than Powerex for [47] selling surplus power?

A. No.

Q. And, in fact, the Province requires that BC Hydro export power only through Powerex; is that right?

A. As a matter of policy, yes.

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[54]

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Q. . . . What would BC Hydro do with its surplus power if Powerex didn't exist?

A. BC Hydro, under normal water conditions, does not have surplus power. Occasionally, under extraordinary high inflows, it would have surplus power. If Powerex didn't exist, BC Hydro would sell any surplus it had at the BC-U.S. or BC-Alberta border as it used to before Powerex gained access to U.S. markets.

Q. Can we go back to your declaration, which is [55] Exhibit 2, I believe. Could you look at paragraph 41?

A. Yes.

Q. You say there that:

> "BC Hydro sells all of its surplus electricity to Powerex . . ."

A. Yes.

Q. Could you explain to me – sorry.

Is trading that surplus power one of Powerex's main functions?

A. No.

Q. Because, in fact, there isn't very much surplus power, from what you just said?

A. Correct.

Q. So what is the relationship between Powerex and BC Hydro power?

A. Well, in regard to this particular issue, the Province made investment in hydroelectric facilities going back to the sixties, and transmission facilities to interconnect with neighboring entities.

The nature of a hydroelectric system is that it – particularly one with large, multi-period storage, such as BC Hydro – is that it will have surplus capability from time to time; that is, the generating capacity of the generating stations is available in excess of the needs of the Province at a particular [56] time. But it may not have the fuel available, depending on load and rainfall and so on.

So what Powerex has done, uniquely, compared to what BC Hydro used to do and would do without Powerex, Powerex buys energy in off-peak periods and utilizes that surplus capacity to sell into markets at other times.

So it's the surplus capability based on the investments the Province made that Powerex is now maximizing the value of.

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[Q.] Is that surplus-transmission capable or surplus-transmission capability?

A. Both.

Q. If Powerex were not performing the function you just described, would BC Hydro have to do it for itself?

A. BC Hydro could not.

Q. Could not. Why not?

A. Because it could not submit itself to FERC regulation.

Q. So – so the functions that Powerex is performing for BC Hydro, BC Hydro could not perform for itself?

[57] MR. BUTZ: Well, he characterized it as functions that BC Hydro is performing for the Province.

MS. CREGAN: Q. Excuse me.

A. That BC Hydro could not do for itself.

Q. Or for the Province.

A. Right.

Q. If the Province didn't have the capability through Powerex to maximize the value of that capacity, how would that change the availability and price of electricity in the Province?

* * * * *

[A.] Well, the earnings of Powerex are consolidated through BC Hydro's Consolidated Statement of Earnings and then utilized under direction by the Province primarily for rate stability.

So absent those earnings, BC Hydro would either be seriously under-earning on its investment from domestic customers, or rates would have to go up.

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[67]

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[Q.] Do you recognize this document?

A. Yes.

Q. Can you tell us what it is?

A. It's the affidavit that I signed on behalf of Powerex concerning FERC's investigation into potential manipulation of electric and natural gas prices in the West.

Q. Could you look at paragraph 5, the section on page 5?

A. Yes.

Q. On Subsection C you testified that:

"The drought conditions that prevailed in the Pacific Northwest during 2000 and 2001, and the hydroelectric energy deficit in British Columbia in these years, required Powerex to purchase large amounts of energy from numerous suppliers to replenish BC Hydro's reservoirs."

Could you explain what that means?

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[68]

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[A.] BC Hydro, in a drought condition, will be short of energy to meet its domestic requirements. So any of the sales that we made had to be offset by purchases. And, indeed, during that year we made more purchases than sales in order to ensure that there was sufficient energy in the Province to meet domestic load.

[Q.] And so, in fact, Powerex was required to go out and purchase power on behalf of BC Hydro.

A. Yes.

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[71]

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Q. Does BC Hydro issue guarantees for Powerex with any counterparties?

A. BC Hydro, on behalf of the Province, issues parental guarantees to counterparties. And, as I've mentioned earlier, we've discontinued the use of LCs to a great extent and are replacing them with parental guarantees. But those are authorized by the Province, and BC Hydro provides them to Powerex.

Q. If those guarantees were called upon, would it be the Province's assets that would be called upon to meet the requirements under the guarantee?

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[72] [A.] Well, if the credit guarantees are called on, it would be on primarily the cash flow of Powerex. Ultimately it would impact the Province through consolidation.

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[73]

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Q. Does Powerex have its own credit rating?

A. No.

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[86]

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Q. So anytime that Powerex wants to engage in a trade that is outside the Risk Management Policy parameters, it needs to go to the Risk Management Committee for approval?

A. Correct. The Risk Management Policy sets out the broad framework within which Powerex can transact, including counterparty credit limits. And anything that goes beyond that needs the approval of the RMC and occasionally, depending on the limits, up to the boards of Powerex and BC Hydro.

Q. Does the RMC set individual counterparty credit limits?

A. No. It sets the parameters by which counterparties can be – counterparty credit limits can be established. So a Double A-rated counterparty would be eligible for a certain level, for example.

[87] Q. Could you go to page 8, please.

A. Yes.

Q. Do you see the section on "Reporting on Transactions"?

A. Yes.

Q. Could you tell us about Powerex's reporting obligations to the Risk Management Committee?

A. On a monthly basis routinely there are standard reports issued to the Risk Management Committee showing credit positions, transaction positions and so on; mark [*sic*] to market, credit VAR calculation, a raft of risk-management tool reporting.

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[94]

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Q. Are Powerex and – sorry. Let me start over. Does BC Hydro have a pension plan?

A. Yes.

Q. Is it related to a government pension plan?

A. It's a separate pension plan from the government's plan.

Q. And are Powerex employees part of the BC Hydro [95] pension plan?

A. Yes, they are.

Q. And are they part of BC Hydro's – does BC Hydro have any other retirement plans?

A. No.

Q. Do Powerex employees have the same employee benefits as BC Hydro employees?

A. For the most part, in terms of standard employee benefits.

Q. Such as –

A. Medical, dental.

Q. Are there any limits on Powerex's ability to pay market compensation to its traders?

A. Yes.

Q. What are they?

A. In the broad context of Provincial guidelines on compensation we're under certain constraints. We have a bonus compensation program that's unique. No one else in the public service has anything like it. But that's in order to be competitive.

Q. But other than the bonus compensation plan, there are – are Powerex's employees paid within Provincial guidelines?

A. Not within Provincial guidelines.

Q. I'm sorry. I must have misunderstood what you [96] said before.

A. I said within the context of what could be accepted provincially, you might say. Again, public salaries or public-service salaries can be a political issue. Powerex aims to compensate at the median of the Canadian market for its traders.

Q. So higher compensation could be politically unpalatable?

A. Yes.

Q. And that would be a problem for the Provincial government?

A. Yes.

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[98]

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Q. . . . Do you recall BC Hydro getting a request for power from the California Governor's Office on January 18th?

A. Yes, I do.

Q. And did that request come from the Governor's Office to BC Hydro?

A. Yes.

Q. And that was not the ordinary course of business?

A. No.

Q. I don't want to ask you for a long narrative, but maybe you could just tell us about the initial request and what you know about the initial request from California for power on January 18th, 2001.

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[99]

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[A.] The fact is we had a no-trade policy with California because of the credit issue. And [100] the Risk Management Committee was unwilling to extend any credit. We could make power available on the basis of purchase for resale, but the credit could only come from the Risk Management Committee. And the call, I believe, from the Governor's Office was basically an appeal to free up the credit so that these transactions could take place.

[Q.] Do you recall how long at that point you had had limitations on trading with California because of credit problems?

A. Well, in early December we ceased selling into the Cal ISO. We continued into the PX for a time.

And there were a variety of creative instruments during that period to try to get credit support for transactions into California, including Edison sending us cash, I believe in – I don't remember exactly the dates.

But the California Department of Water Resources got a letter of credit for a short period and then decided that they didn't have the authority to do that. So it was a "schmozzle" as they say – I don't know how you spell that, Madam Reporter, but – and so this high level appeal came in to try to get some mechanism in place so that these transactions could occur.

[101] Q. And who was involved in any discussions that took place about whether those transactions could occur?

A. The chairman of BC Hydro as kind of the senior political representative, if you will; the CEO of BC Hydro, and the chair of the Risk Management Committee, and other members of the Risk Management Committee.

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[102]

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Q. So as a result of discussions among – and you'll correct me if I get this wrong – BC Hydro's chair, members of the Risk Management Committee and yourself, was power made available to the CDWR on January 18th?

A. I don't remember specifically what happened on January 18th, but it set in motion the creation of a credit facility that allowed us to continue to trade with CDWR for a number of months.

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[103]

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Q. Would Powerex have been able to enter into that arrangement with CDWR without BC Hydro's approval?

A. No. Again, it's the Risk Management Committee that sets the limits.

Q. Was anyone from the Province involved in any of these discussions about changing the credit limits so you could trade with CDWR – or make power available to CDWR?

A. I believe Mr. Smith contacted the minister's office about this situation because it had the potential to be escalated to an international incident.

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[118]

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Q. How many of Powerex's employees are trader staff?

A. Out of approximately 120 employees, between 50 and 60 would be in the front-office category that would make them eligible for bonuses. Although all employees are treated in the same pool, it's only the front-office staff that have access to the larger bonus.

Q. So all employees are eligible for bonuses.

A. Yes.

Q. And how is the bonus pool calculated?

A. It's through a formula based on earnings in Powerex.

Q. What is that formula?

A. I don't recall just off the top.

[119] Q. Is it a percentage of Powerex's profits?

A. Yes. It funds in a gradual way up to a cap which is set by the board.

Q. So is it a true statement that the greater the profit Powerex makes the higher the percentage of bonus?

A. No. Let's see if I can remember the formula. We have to meet a certain minimum income target before the pool starts to fund. And then the pool funds at 10 cents on the dollar to the bonus pool and 90 cents to the rest of consolidated income. And then there's a cap put on it by the board, and the caps kicks in at a low level.

Q. What was the total bonus pool in fiscal year 2001?

A. Less than 5 million, Canadian.

Q. And fiscal year 2000?

A. Less than 4 million Canadian. These are very approximate numbers.

Q. And 2002?

A. I'm sorry, I think – I would say –

Q. Yeah, I guess I'm confused because you've already issued an Annual Report 2002 –

A. Yes.

Q. – which is for the fiscal year ended in March 2002, so just to be clear –

[120] A. Let's go back. Fiscal year 2002, approximately 4 million. Fiscal year 2001, somewhat less than 5 million. Fiscal year 2000, I believe less than 4 million. These are all in Canadian dollars.

Q. All right. And that's 10 percent of the profits or 10 percent of revenues?

A. It's 10 percent of the net income calculated for Powerex but capped at, as I said, a fairly modest level by the board.

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[126]

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Q. Let's talk about the retirement package. Who administers this retirement plan?

A. It's a trustee on behalf of BC Hydro and Power Authority.

Q. Who's the trustee?

A. I don't know.

Q. Is it administered in the same way as private companies have pension plans?

A. It's a defined pension plan that's probably closer in administration to the way the Province administers its Superannuation Fund.

Q. Are you aware of any other government – strike that.

How does the – how do Canadian government [127] employees or Provincial employees ordinarily get paid their pensions? Can you just describe generally what that system is like?

A. There is a contribution formula that, over time, yields a defined benefit at a certain age. So that an employee makes a contribution, the employer matches – I don't know exactly the formula – but at a certain age and number of years of service, they're eligible for a defined pension benefit based on a percentage of their last five years, I think it is, the calculation of earnings.

Q. Is that similar to our Social Security system, if you're familiar with that?

A. I don't know. I'm not familiar with that.

Q. Does the government guarantee – for those other employees that we're talking about now, does the government guarantee the payment of those benefits, or does it depend on the performance of some funds that have been invested?

A. Which other employees are you speaking of?

Q. We're talking about how it ordinarily works for Provincial or Canadian-government employees.

A. Oh, yes, the government guarantees it.

Q. And for Powerex do those employees receive their retirement benefits if, for example, the company [128] were to go bankrupt?

A. If Powerex were to go bankrupt?

Q. Yes.

A. The accumulated pension benefits would be guaranteed.

Q. By who?

A. By the Province through BC Hydro.

Q. Is there a document which establishes that?

A. I don't know.

Q. Then what's the basis for your statement?

A. Because the Province set up BC Hydro in that form.

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[131]

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Q. And outside directors are also selected by the BC Hydro board with the approval of – what was the name of the minister or –

A. I believe it's the Premiere's Office.

Q. Have they ever refused to approve an outside director selected by the – of Powerex selected by the BC Hydro board?

A. Yes.

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[132]

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Q. What are the different business activities that Powerex does? I mean the whole spectrum: trading, electricity. Anything else besides buying and selling electricity?

A. We buy and sell natural gas.

Q. Anything else?

A. Those are the principal activities.

Q. Any other activities?

A. Countless man-hours spent in regulatory [133] proceedings.

Q. Anything else?

A. Not of a business – not of a direct business nature, I would say.

Q. What – approximately what percentage of Powerex's revenue is attributable to purchases and sales of natural gas as opposed to electricity?

A. Less than 5 percent of natural gas.

Q. Where does Powerex buy its natural gas from?

A. Primarily at the Sumas Trading Hub.

Q. What is that?

A. Sumas is a point on the BC-Washington state border at the intersection of a number of pipelines.

Q. What does Sumas stand for?

A. The name of a town in Washington state.

Q. So –

A. It's not an acronym.

Q. So is this – who makes the market for this gas? With what entity is it traded through?

A. There are many entities trading there. I don't know them all. But West Coast, now owned by Duke, would be one key player there; the BC Gas Company; many U.S. traders.

Q. The Sumas Trading Hub is a physical location or a corporation?

[134] A. It's a physical location.

Q. And that is in the United States.

A. It's on the border. I believe there may be a Sumas, British Columbia as well, but it's a border point.

Q. And are BC Hydro's sales as well as purchases done primarily through Sumas?

A. That's probably the majority of them, but we also trade in other hubs.

Q. What other hubs?

A. Empress in Alberta, so-called Station 2 in Northern BC. A limited amount in the Rockies.

Q. Does BC Hydro provide natural gas to its retail customers?

A. No.

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[136]

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Q. You spoke yesterday about BC Hydro's mix of – excuse me, Powerex's mix of supply, correct?

A. Yes.

Q. What do you mean by that?

A. Well, as I said yesterday, Powerex acquires a portfolio of supply resources from numerous [137] counterparties. There are a couple of large positions that we have, including the Canadian Entitlement and downstream

benefits, but otherwise most of them tend to be fairly short-term and relatively small.

Q. And of the power that you – "you" meaning Powerex – whenever I say "you" I generally mean Powerex – that you sell, how much is Canadian Entitlement power?

A. Canadian Entitlement power last year, for example, would have been about 15 percent of our total sales.

Q. So it's the largest single source of power, but it's not the majority of the power that you sell –

A. Correct.

Q. – is that correct?

A. Correct.

Q. What is the next largest single source of the power that you sell?

A. I can't think of the – off the top. We have so many different sources of varying quantities and durations that they would be rather modest by comparison.

Q. Do you have any idea of the total number of different sources of power there are that you purchase?

A. Well, we have between 150 and 200 [138] counterparties that we deal with, and we buy and sell from virtually all of them.

Q. How many of those are in the U.S.?

A. The majority would be in the U.S.

Q. So more than 50 percent.

A. Yes.

Q. More than 60 percent?

A. Yes.

Q. More than 70 percent?

A. Probably.

Q. More than 80 percent?

A. I don't think so.

* * * * *

[139]

* * * * *

Q. Who do you regard as your principal competitors?

A. Bonneville Power Administration, American Electric Power, Duke Energy Trading and Marketing, TransAlta Energy Marketing, TransCanada, Pacificorp.

Q. Okay. Any others?

A. And the list goes on.

Q. Of those you just mentioned, aside from the Bonneville Power Administration, which of them are owned by governments, United States or Canadian governments?

A. Of the list that I mentioned, only Bonneville.

* * * * *

[141]

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[Q.] Does Powerex have any immunity from suit, civil lawsuits, in Canada?

A. No.

* * * * *

[147]

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[Q.] Powerex is not a Crown corporation, is it.

A. It's a subsidiary of a Crown corporation.

Q. But Powerex is not itself a Crown corporation, is it.

A. No, it isn't.

Q. Is there anything in this document, this entire Exhibit 18, that you can tell me distinguishes Powerex from any ordinary privately-held Canadian corporation? [148] Point to anything you like.

* * * * *

[A.] Not in this document.

* * * * *

[150] Q. Did BC Hydro solicit proposals from any of those potential marketing entities?

A. No, the Province did.

Q. The Province did solicit proposals.

A. Yes.

Q. From who?

A. From Enron Capital and Trade and from a consortium of Puget, Duke and Louis Dreyfuss.

Q. Did you ever see those proposals?

A. Yes, I did.

Q. Can you describe the terms of any of those proposals?

A. They were very preliminary. Generally the proposal was that they would take title to the power and have some revenue-sharing mechanism with the Province.

Q. Share profits?

A. Yes.

Q. Was the formula they proposed in any respect similar to the formula agreed upon in the assignment agreement, Exhibit 3 to your deposition?

A. No.

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[154]

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Q. Why would Powerex ever have a dispute with BC Hydro or the Province about how much money it was supposed to pay them? Why wouldn't it just give them whatever they asked for?

* * * * *

[155]

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[A.] We have a mechanism for determining the value of the power, and there is potentially some dispute over that. We will not pay them whatever they ask, because that might bankrupt us.

* * * * *

Q. Let's go to Section 14.1.. There is a statement in there:

". . . Powerex will not be or be construed as the agent of the Province . . ."

Why did you put that section in there?

* * * * *

[156] A. Well, there is some attorney-client privilege element I believe in this, but in broad strokes, it's to ensure that the Province isn't subject to FERC regulation by the fact of Powerex's market-based sales in the U.S. based on the entitlement.

* * * * *

[165]

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- Q. Does Powerex sell power to BC Hydro at cost or is there some sort of a markup?

A. There's a transfer pricing mechanism.

Q. Can you describe that?

A. It's simply an index-based transfer price.

Q. And which index is used?

A. The Mid-Columbia.

Q. So regardless of the price that Powerex pays for that power, it charges BC Hydro the index price.

A. Yes, and gives BC Hydro an index price when it takes the power out.

* * * * *

[170]

* * * * *

Q. Taking a look at Exhibit 13 of yesterday, at the bottom of the first page under the heading, "The Structure of Agreements Between BC Hydro and Powerex," [171] there's –

A. Is this the letter from the Commission?

Q. Yes, it is, the first document in this exhibit.

A. Yes.

Q. It's a reference to Commission Letter No. L-15-00 which says:

> "... the commission acknowledged that Powerex would not be a public utility if it acts at arm's-length from BC Hydro. The Commission requests comments from the JIESC and CAC (BC) et al. on the relationship between Powerex and BC Hydro and any implications for the Commission's involvement in monitoring the activities of BC Hydro and Powerex."

Did I read that correctly?

A. Yes.

Q. And the next – there's a document – these pages aren't numbered, but there is a letter dated 30 June 2000

to the BC Utilities Commission. Is that the response called for by the quote I just read?

A. Yes, I believe it is. But only in part.

Q. What was the British Columbia Utilities Commission's final conclusion on the issue of whether Powerex was or was not a public utility?

A. The British Columbia Utilities Commission [172] concluded that Powerex was not a public utility.

Q. And what is the definition of a public utility?

A. I will answer in lay terms. It's a utility engaged in service to end-use customers in the Province and regulated for that purpose by the commission.

* * * * *

[174]

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[Q.] Going to Exhibit 6 at page 571.

A. Yes.

Q. In the lower left-hand corner there's a bar chart which is entitled "Payments to the Province." And there are three items reflected in each bar. One of them is "Taxes." And this bar is measured in the hundreds of millions of dollars.

Can you explain for me what taxes are paid to the Provincial government?

A. I believe they're primarily grants in lieu of property taxes. It's – BC Hydro holds many properties around the Province. All property is subject to a property-tax formula, but BC Hydro is not subjected to that tax per se, but, through some accommodation that [175] was made years ago, they pay so-called grant in lieu of property taxes. I believe that's what it is. That's the best of my knowledge.

* * * * *

[177] [Q.] Showing you what has been marked as Exhibit 21.

Q. Have you ever seen this before?

A. Yes.

* * * * *

[Q.] So is it true that Powerex was the subject of a criminal investigation?

A. Technically I don't know whether it was a criminal or civil, but I guess it was criminal. We were investigated by the Competition Bureau of Canada.

Q. And what is the Competition Bureau of Canada?

A. It is an entity established to investigate matters of fair competition as defined under the Competition Act.

* * * * *

[178]

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Q. Have there been any other investigations of Powerex by any government agency or entity that you're aware of?

A. Not formal ones.

* * * * *

[179]

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Q. What government regulatory bodies, be they of the government of Canada as a whole or a political subdivision thereof, have any sort of regulatory jurisdiction over Powerex?

A. The National Energy Board.

Q. And what is its charge?

A. Its charge is to regulate the export of energy from Canada, and it also has regulatory authority over I think inter-provincial and international transmission lines.

Q. Does it regulate Powerex's sales of energy outside of Canada, export of energy?

A. Yes.

Q. And what is it allowed to do with respect to Powerex in that regard? Prohibit sales? You need its permission to make sales? Can you give me some idea?

A. We have blanket authorization in terms of quantity. The National Energy Board also requires us to make power available to Canadian purchasers on the same terms and conditions as it makes it available to non-Canadian purchasers. And contracts over a certain length need National Energy Board approval.

Q. And does the commission have jurisdiction over non-governmental energy companies in Canada as well?

[180] A. Yes.

Q. Are the regulations any different with respect to one versus the other?

A. No. The other area that we're regulated by is the Energy Removal Certificate process in British Columbia which, in many respects, mirrors the National Energy Board regulations.

Q. And is Powerex treated any differently under that regulatory regime than any privately-held company would be?

A. No.

* * * * *

[183]

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Q. What is Powerex's role in actually providing that power to Seattle?

A. We schedule it, and we have the transmission arrangement in our name, which allows us to optimize the value for the Province.

Q. How does Powerex do that?

A. By utilizing the unused portion. In order to deliver 230 megawatts in over just a few hours, transmission has to be reserved for the whole year.

Q. Could you keep talking, please? Because I don't get it yet.

A. Well, if you have to deliver 230 megawatts on demand – and that's the nature of the requirement. Seattle can call on that at any time. But there are a limited number of hours that they can call on it because of the relationship between the fuel and the actual [184] generating capacity.

But to ensure that they can get it when they want it, you have to have the firm transmission in place. For the rest of the hours, some 90 percent of the hours, that transmission was going un-utilized.

Q. And Powerex does what again?

A. Powerex makes use of that transmission in a way that reduces the overall cost of the Province's obligation to Seattle.

Q. All right. I don't want to misstate your testimony. I just want to make sure I understand. So BC Hydro purchases 24/7 firm transmission capacity, and Powerex resells on the market the 90 percent of it that's not needed to fulfill BC's obligations under the Skagit Treaty?

A. Powerex purchases the transmission.

Q. Okay. And how is – what is the financial arrangement, if any, between BC Hydro and Powerex with respect to the Skagit River Treaty?

A. There is none. They have simply assigned the requirements under the Treaty to Powerex to schedule the power.

* * * * *

[186]

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Q. No. 7, "Whether Powerex has exercised regulatory authority delegated by any government," does Powerex itself possess any regulatory authority as opposed to being subject to regulation?

A. No.

* * * * *

[187]

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Q. Are Powerex's employees, aside from the outside directors, all selected within Powerex, or does anyone outside of Powerex select them?

A. They're all selected by Powerex.

* * * * *

[188]

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Q. I believe you said that the Canadian Entitlement power is about 15 percent of Powerex's total sales –

A. Yes.

Q. – is that right?

But that total sales number would include all of the sales you make as part of your total trading volume; is that correct?

A. Yes.

Q. In the course of this exchange you had mentioned asset positions. Can you tell me what you meant by that?

A. Contracts that we have in – well, I think I was referring to that in the context of some other traders that don't have specific assets, but we have the assets that Hydro operates on behalf of the government, and we have some contracts that are the equivalent of positions at various trading points.

Q. And is the Canadian Entitlement power an asset as well?

A. Yes.

Q. So when you say "asset positions," you mean [189] power that is transferred under some arrangements to Powerex in order to sell into the market; is that right?

A. Correct.

Q. And what percentage of your asset positions is the Canadian Entitlement power?

A. Probably 80 percent.

Q. Thank you.

A. In relation to the total volume of purchases. If we put it in the context of the asset positions of the Province and the capability of BC Hydro system, it's, again, on the order of 15 to 20 percent, but . . .

Q. Could you take a look at Exhibit 13 for a moment? Mr. Himmelstein asked you a couple of questions about the statement in the July 17th cover letter –

A. Yes.

Q. – that says that ". . . Powerex would not be a public utility if it acts at arms-length from BC Hydro"?

A. Correct.

Q. Is the use of transfer pricing one of the ways in which Powerex attempts to act at arm's length to BC Hydro?

A. It's one of the ways that Powerex acts at arm's length from BC Hydro.

Q. And you also act at arm's length from BC Hydro [190] in that you make nondiscriminatory market-rate payments for transmission?

A. I think there are a couple of concepts mixed up there.

Q. Sorry.

A. But we act at arm's length in the sense that we have to purchase transmission from BC Hydro on the same basis as any other player in the marketplace.

Q. But, in fact, the document that's – the export trade report is the partial response to this July 17th letter you testified; is that right?

A. Yes. What I meant by that was that the specifics of the arm's length relationship I think covers only part of the request for a Report on Export Trade.

Q. And in the Report on Export Trade at page 2, in the second paragraph, BC Hydro discussed – I'm sorry. Let's go back to paragraph 1. In paragraph 1, BC Hydro talks about the fact that Powerex as a transmission user is treated the same as any third party, correct?

A. Yes.

Q. And then it goes on to discuss the, quote, "very close" relationship between Powerex and the Power Supply Group within BC Hydro –

A. Yes.

[191] Q. – when it comes to the optimization of generation assets.

A. Um-hm.

Q. And for the optimization of generation assets, Powerex is not intended to be working at arm's length from BC Hydro?

A. No. The Power Supply Group and Powerex are intended to operate very closely together to maximize the value for the Province.

Q. Could you take a look at Exhibit 18, please, which is the Articles of Incorporation. And take a look again at Section 3.1 which is the paragraph I believe you were discussing with Mr. Himmelstein.

A. Yes.

Q. Correct me if I'm wrong, but I think you testified that – and I think I'm using your word here – "instruments," such as selling shares to any persons or granting options on the shares of Powerex, are not available to the Powerex board?

* * * * *

[A.] What I said was that technically, under the Company Act, that those instrumentalities are available, but practically they are not.

[Q.] And can you tell us [192] practically why they're not available?

A. Because the government wouldn't permit us to do it on our own without having approval by the government.

Q. What is your belief about what would happen if the Powerex board tried to sell shares to an entity that hadn't been approved by the Province?

* * * * *

[A.] They would be removed.

* * * * *

[193]

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Q. So the purchase price that you pay to the Province affects Powerex's trading profits; is that correct?

A. Yes, but I'm not sure how it works through the financial statements. I'm not sure whether they're kept completely separate or not. Quite frankly, I haven't informed myself about that.

The transfer pricing agreement – the assignment agreement and pricing thereunder is intended to capture as much for the Province as possible directly and leave as little over for consolidation into BC Hydro revenue as a means of capturing the economic rent directly by the government as opposed to the ratepayer mechanism that is otherwise utilized to distribute benefits from BC Hydro and Powerex operations.

* * * * *

[Counsel name/address blocks omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Coordination Proceeding	Nos. CV 02-0990-RHW
Special Title (Rule 1550(b))	CV 02-1000-RHW
	CV 02-1001-RHW

WHOLESALE ELECTRICITY
ANTITRUST CASES I & II

This Document relates To:

Reliant Energy Services, Inc., et al. v.
Arizona Electric Power Cooperative, Inc., et al.

Duke Energy Trading and Marketing, LLC, et al. v.
Arizona Public Service Company, et al.

Reliant Energy Services, Inc., et al. v.
Arizona Electric Power Cooperative, Inc., et al.

POWEREX'S CORP.'S NOTICE OF LODGMENT IN SUPPORT OF CROSS-DEFENDANTS' POWEREX CORP.'S SUPPLEMENTAL BRIEF IN SUPPORT OF SUBJECT-MATTER JURISDICTION

TO ALL PARTIES, THEIR COUNSEL OF RECORD, AND TO THE HONORABLE COURT:

PLEASE TAKE NOTICE that Cross-defendant Powerex Corp. hereby lodges the following exhibits referenced in Powerex Corp.'s Supplemental Brief in Support of Subject-Matter Jurisdiction.

Exhibit	Title
	* * * * *
4.	Letter from Honourable Jack Davis, Minister, to Larry Bell, Chairman and Chief Executive Officer, BC Hydro, dated November 4, 1988.

Dated: September 3, 2002

[Signature/address block omitted]

EXHIBIT 4

[Seal omitted]

Province of British Columbia OFFICE OF THE MINISTER	**Ministry of Energy, Mines and Petroleum Resources**	**Parliament Building Victoria British Columbia**

November 4, 1988

Mr. L. I. Bell
Chairman & Chief Executive Officer
B.C. Hydro
21st Floor
970 Burrard Street
Vancouver, B.C.
V6Z 1Y3

Dear Larry:

Cabinet has decided that we should provide a single window agency to be responsible to market the export of power outside the province and that this entity should be a wholly owned subsidiary of B.C. Hydro.

Would you please proceed to incorporate the Export Agency.

Yours truly,

/s/ JACK DAVIS

Honourable Jack Davis
Minister

[Counsel name/address block omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Coordination Proceeding
Special Title (Rule 1550(b))

Nos. CV 02-0990 (RHW)
CV 02-1000 (RHW)
CV 02-1001 (RHW)

WHOLESALE ELECTRICITY
ANTITRUST CASES I & II

AND RELATED CROSS-ACTIONS

Reliant Energy Services, Inc., et al. v.
Arizona Electric Power Cooperative, Inc., et al.

Duke Energy Trading and Marketing, LLC, et al. v.
Arizona Public Service Company, et al.

Reliant Energy Services, Inc., et al. v.
Arizona Electric Power Cooperative, Inc., et al.

REPLY DECLARATION OF BARRY R. HIMMELSTEIN IN SUPPORT OF MOTION TO REMAND AND MOTION TO STRIKE AND/OR SEVER CROSS-COMPLAINTS

I, BARRY HIMMELSTEIN, declare and state:

1. I am a partner in the law firm of Lieff, Cabraser, Heimann & Bernstein, LLP, counsel for plaintiff Oscar's Photo Lab and Mary L. Davis in these coordinated actions. I have personal knowledge of the facts set forth herein, and could and would testify competently thereto if called upon to do so.

2. Attached hereto are true and correct copies of the following documents:

* * * * *

Exhibit 2 Transcript of the Deposition of Ken R. Spafford taken on August 27, 2002

* * * * *

Exhibit 4 Exhibit 13 to the Deposition of Kenneth Grant Peterson taken on August 21, 2002 (Letter from British Columbia Utilities Commission dated July 17, 2000)

* * * * *

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed this 3rd day of September, 2002 at San Francisco, California.

Dated: September 3, 2002

LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

By: /s/ BARRY R. HIMMELSTEIN

Barry R. Himmelstein

[Address block omitted]

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Coordination Proceeding Special Title (Rule 1550(b)) — No. CV 02-0990-RHW

WHOLESALE ELECTRICITY ANTITRUST CASES I & II

This Document relates to:

ALL ACTIONS

DEPOSITION OF KEN R. SPAFFORD

Tuesday, August 27, 2002

* * * * *

[3]

* * * * *

KEN R. SPAFFORD

called as a witness by the Defendants, who, having been first duly sworn, was examined and testified as follows:

* * * * *

[66]

* * * * *

[Q.] . . . Let's go back to the Exhibit 4, the 2001 Annual Report.

Q. If you'd go to the page marked 880 at the bottom. It says, ". . . we actually ended up as a net importer for the year . . ."

That refers to the year ended March 31st, 2001?

A. Yes.

Q. And where in this document – and I suggest the possibility of page 939 – could I see what the net is for BC Hydro in terms of imports and exports? By "BC Hydro" I mean consolidated reporting.

Where are the numbers in this document that show that BC Hydro ended up as a net importer for the year?

A. Page 939 will not tell you that.

Q. What will?

A. I suspect it's somewhere in the text, but exactly where, it would take me some time to find.

Q. Would any of these numbers, these operating statistics, or anything in the financial statements reflect that? And please do take your time, because this is about the only question I have for you.

(Witness reviews document)

[A.] If you look at page 908. The [67] last paragraph on that page, first sentence:

> "The lower level of water inflows during the year contributed to BC Hydro being in a net import position of approximately 1700 GW-h for the year"

I think that's the most accurate description of the net import position for that fiscal year.

[Q.] And do you know if BC Hydro was in a net import or export position for fiscal year 2002?

A. My recollection is, is that we were a net importer for fiscal 2002, and that would be reflected in our 2002 Annual Report, which is available.

Q. And how about 2000?

A. Again, I can't give you the precise numbers, but from the information in this document it would appear that we were in a slight export position in the year 2000.

Q. Slight.

A. That's correct. And the numbers on which I base that are the – electricity trade sales are shown on page 939. In this case they show an electricity trade sale of 23410, 23,410.

And on page 908 it shows the category of "Other energy purchases," which includes a lot of the energy [68] that's purchased for the electricity trade. And it shows a number there of 21,188, which indicates that there was slightly more sales than there were purchases.

Q. What does the acronym "IPP" refer to?

A. IPP means purchases from independent power producers, which are typically generators in the Province of BC.

Q. So if we go back to 939, is there any math you could do on the numbers on that page which would equal the 1700 gigawatt net import position shown on page 908?

A. It comes close, but not exactly. The math that I would do would be to compare the "Other energy purchases" for 2001 of 25,893.

Q. I'm sorry, what column and line?

A. That's under "Other energy purchases for 2001 in gigawatt hours. So that's the third numerical column in that, 25,893.

* * * * *

[Q.] Oh, I'm sorry. One more time, if you wouldn't mind.

[A.] Okay. If I compare the "Other energy purchases" of 25,893 –

[Q.] Yes.

[A.] – for the year 2001, and compare [69] that to 23,900 of electricity trade sales.

[Q.] That's on 939.

[A.] That's on 939. The difference between those is approximately 2000 gigawatt hours, which is roughly the same as the 1700 indicated at the bottom of page 908.

[Q.] So is it a correct statement that on average the BC Hydro system does not have, on a net basis, excess supplies for export?

A. That's generally been the case in the most recent years, yes, the last three years, for example.

If you go back in time – which, unfortunately my experience with Hydro allows me to do sometimes – historically we have been net exporters.

Q. How far back in time?

A. I've been with Hydro for 29 years, so . . .

Q. How far back in time were they net exporters?

A. Certainly during the early part of the 1980s – well, throughout the eighties and the early part of the nineties we were net exporters. Towards the end of the nineties we were approximately in load and resource balance, and for the last three years or so have been – or last two years have been net importers.

EXHIBIT 4

[Address and Seal omitted]

BRITISH COLUMBIA UTILITIES COMMISSION

LETTER NO. L-34-00

ROBERT J. PELLATT
COMMISSION SECRETARY

Log No. 3602

VIA FACSIMILE July 17, 2000

Mr. R. Brian Wallace
Bull, Housser & Tupper
Barristers & Solicitors
3000 Royal Centre,
P.O. Box 11130
2500-1055 West Georgia Street
Vancouver, B.C. V6E 3R3

Mr. R.G. Gathercole
Executive Director
BC Public Interest Advocacy Centre
815-815 West Hastings Street
Vancouver, B.C. V6C 1B4

Dear Sirs:

Re: British Columbia Hydro and Power Authority ("B.C. Hydro") Report on Export Trade
BCUC Staff Information Request

In Commission Letter No. L-15-00, the Commission directed B.C. Hydro to file a report related to its electricity trade activities, in part, since actions taken by B.C. Hydro at this time can have significant consequences to ratepayers after the expiry of the rate freeze. The Commission noted that electricity trade was a contentious issue at B.C. Hydro's last revenue requirements hearing, and that the Commission's forecast of electricity trade revenues was made using less than adequate information.

Commission Letter No. L-15-00 directed B.C. Hydro to fully describe its export trade activities in the following three areas:

The structure of agreements between B.C. Hydro and Powerex;

Financial information; and

The rate stabilization account.

B.C. Hydro responded with the enclosed Report on Export Trade dated June 30, 2000. Since the request for the Report on Export Trade evolved out of a complaint by the Joint Industry Electricity Steering Committee ("JIESC") and the Consumers' Association of Canada (B.C.) et al. ("CAC (B.C.) et al."), the Commission is providing an opportunity for these parties to comment on B.C. Hydro's report and the degree to which it provides the information requested in Commission Letter No. L- 15-00. Specifically, the Commission encourages JIESC and CAC (B.C.) et al. to comment on the following issues:

1. The Structure of Agreements between BC. Hydro and Powerex

In Commission Letter No. L-15-00, the Commission acknowledged that Powerex would not be a public utility if it acts at arms-length from B.C. Hydro. The Commission requests comments from the JIESC and CAC (B.C.) et al. on the relationship between Powerex and B.C. Hydro and any implications for the Commission's involvement in monitoring the activities of B.C. Hydro and Powerex.

[Address and Seal omitted]

BRITISH COLUMBIA UTILITIES COMMISSION

LETTER NO. L-15-00

ROBERT J. PELLATT
COMMISSION SECRETARY

Log No. 2973

VIA FACSIMILE April 6, 2000

Mr. Ray Aldeguer
Senior Vice President
Legal, Regulatory Affairs and General Counsel
British Columbia Hydro and Power Authority
17th Floor, 333 Dunsmuir Street
Vancouver, B.C. V6B 5R3
Dear Sirs:

Re: British Columbia Hydro and Power Authority
Commission Letter No. L-7-00
Report on Export Trade

The Commission has considered your submissions of February 29, 2000 and March 29, 2000 in response to Commission Letter No. L-7-00. The Commission has also considered the submissions of the Joint Industry Electricity Steering Committee and the Consumers' Association of Canada (B.C.) et al. on this issue.

The Commission agrees with B.C. Hydro that the pending legislation to extend the rate freeze until September 30, 2001 will postpone any revenue requirements review of the Utility during this fiscal year. Therefore, the requirement to obtain export trade information could be delayed if this information was needed solely for rate setting purposes. The Commission also accepts that Powerex is not a public utility if it acts at arms-length from B.C. Hydro, and as such the focus of further reporting by B.C. Hydro should be on the nature of the transactions entered into by B.C. Hydro with its non-regulated subsidiary. However,

as recently affirmed by Order in Council No. 493 (dated March 30, 2000) amending Special Direction No. 8, the Commission is directed to calculate B.C. Hydro's return on equity using projections of consolidated net income that include an amount of electricity trade income consistent with the Commission's forecast of annual net export revenue under average water conditions.

The Commission also agrees with the submissions of the customer groups that the actions of B.C. Hydro with respect to electricity trade are very important to the welfare of ratepayers. In its most recent correspondence, B.C. Hydro indicates that a modified Rate Stabilization Account is to be established by the government through an Order in Council to change Special Directive No. 2 to B.C. Hydro. Order in Council No. 494, dated March 30, 2000, establishing Special Directive No. 4 to B.C. Hydro, sets out the operation of the Rate Stabilization Account for the dual purpose of helping B.C. Hydro achieve its targeted return on equity and keeping rates stable despite stream flow fluctuations. Therefore, actions taken by B.C. Hydro at this time, can have significant consequences to ratepayers after the expiry of the rate freeze. The ways in which B.C. Hydro manages its reservoirs in relation to the water flows into those reservoirs have the greatest single operational impact on the rates paid by domestic customers.

The Commission has an ongoing responsibility pursuant to Sections 23, 24, and 43 of the Utilities Commission Act to keep itself informed about B.C. Hydro's actions with respect to electricity trade. Electricity trade activities of B.C. Hydro have not been reviewed since 1994 and the nature of electricity markets has changed dramatically since that time. In its February 2000 Interim Report for the Nine Months ended December 31, 1999, B.C. Hydro stressed how the evolution of electricity markets had created a substantial opportunity for the Utility to purchase electricity from external sources when prices are low and store water behind its reservoirs to later utilize for export trade activity when market prices are high.

The Commission therefore directs B.C. Hydro to submit a report to the Commission by June 30, 2000 fully describing its export trade activities in the following three areas:

1. The Structure of Agreements between B.C. Hydro and Powerex

   B.C. Hydro is to clearly explain the nature of the transactions with respect to electricity trade between B.C. Hydro and its subsidiary Powerex. B.C. Hydro should also clearly explain how the content of each agreement entered into between them affects the structure of the electricity trade arrangements between the two parties. This section of the report should demonstrate the extent to which B.C. Hydro is safeguarding its domestic customers' interest in its arrangements with Powerex. For instance, the report should explain whether or not B.C. Hydro and Powerex are acting at arms-length. The Utility should also detail how it is safeguarding the interests of its domestic ratepayers through the consolidation of Powerex's revenues for revenue requirement purposes, or by transfers from Powerex to B.C. Hydro prior to export sales. The information provided should explain the nature of the agreements without disclosing any commercially sensitive information with respect to export trade.

2. Financial Information

   B.C. Hydro is to demonstrate, through the provision of historic and current financial information, how the export trade activities between B.C. Hydro and Powerex benefit domestic ratepayers fairly for the storage and generation assets of B.C. Hydro. The Commission recognizes B.C. Hydro's concern with respect to disclosing commercially sensitive information, but the Commission requires B.C. Hydro to provide adequate data to fully inform the Commission on the conduct of its public utility business with respect to electricity trade. B.C. Hydro should respond to those matters addressed

in Commission Letter No. L-7-00 and provide financial details to the Commission without disclosing any commercially sensitive information.

3. The Rate Stabilization Account

To better understand the impacts on ratepayers, B.C. Hydro is to detail the operation of the Rate Stabilization Account for Fiscal Year 1999/00, and its expected operation for Fiscal Years 2000/01 and 2001/02. The report should provide details on the state of B.C. Hydro's reservoirs and the expected water inflows based upon up-to-date snowpack information and forecasts of low, average and high precipitation for the remainder of calendar year 2000 and 2001 up to September 2001. Depending on the nature of the transactions between B.C. Hydro and Powerex, storage rights and water inventories held by Powerex at different times over the period should be identified. B.C. Hydro should then provide its load resource analysis to indicate domestic demand and export trade activities throughout the period to demonstrate how domestic customers will be protected during the rate freeze period and how B.C. Hydro will be well positioned to protect customers after the end of the rate freeze. B.C. Hydro should indicate if there are any conditions under which the Rate Stabilization Account balance will be used for any purpose other than domestic customer rate protection and protection of payments to the provincial government pursuant to Sections 5, 6, and 7 of Special Directive No. 4.

Electricity trade was a contentious issue at B.C. Hydro's last revenue requirements hearing, and the Commission's forecast of electricity trade revenues was made using less than adequate information. Since 1994, B.C. Hydro's net income from electricity trade has more than tripled, its revenues from electricity trade are approaching one-third of its total revenues, Powerex has become a sophisticated trader, and markets for electricity trade have become more accessible, diverse, and complex. The Commission has an

ongoing obligation to ratepayers, to B.C. Hydro, and to the Lieutenant Governor in Council to gain a better understanding of B.C. Hydro's electricity trade activities and accounting practices.

Yours truly,

Original signed by:

Robert J. Pellatt

WJG/mmc

cc: Mr. Richard Gathercole
Executive Director
B.C. Public Interest Advocacy Centre
Mr. R. Brian Wallace
Bull, Housser & Tupper Barristers & Solicitors

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Coordination Proceeding
Special Title (Rule 1550(b))

Nos. CV 02-0990-RHW
CV 02-1000-RHW
CV 02-1001-RHW

WHOLESALE ELECTRICITY
ANTITRUST CASES I & II

This Document relates to:

ALL ACTIONS

RELIANT ENERGY SERVICES, INC., ET AL.,
Defendants and Cross-Complainants,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-Defendants.

ORDER DENYING EX PARTE APPLICATIONS TO STAY REMAND ORDER AND SETTING HEARING ON MOTION FOR RECONSIDERATION

Before the Court is Defendants Duke Energy's and Reliant Energy's *Ex Parte* Application for Stay of the Court's Remand Order (Ct. Rec. 201) and Cross-Defendant Powerex Corp.'s ("Powerex") *Ex Parte* Application for Stay of the Court's Remand Order (Ct. Rec. 204). Despite the rather extensive briefing submitted on the stay issue, the question presented to the Court by the parties' applications is rather simple: can the Court stay its remand order pending appeal when the premise for the Court's order was that it did not have subject matter jurisdiction over the removed action?

The starting point for the inquiry begins with 28 U.S.C. § 1447(d), which provides: "An order remanding a case to State court from which it was removed is not reviewable on appeal or otherwise." The Supreme Court has held that this provision is to be interpreted in concert with § 1447(c), such that remand orders issued under § 1447(c) and "invoking the grounds specified therein" are immune from review. *See Thermtron Prods. Inc. v. Herrnansdorfer*, 423 U.S. 336, 345-45 (1976), *abrogated on other grounds by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996). Lack of subject matter jurisdiction is one ground for remand under § 1447(c). *Cf. Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28 (1995) ("As long as a district court's remand is based on . . . lack of subject-matter jurisdiction – the grounds for remand recognized by 1447(c) – a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d).").

In this regard, staying an order remanding a case for lack of subject matter jurisdiction violates the aim and purpose of 28 U.S.C. § 1447(d). For this reason, courts have expressly stated that a stay of a remand order issued under the imprimatur of § 1447(c) is prohibited. *See Volvo of America Corp. v. Schwarzer*, 429 U.S. 1331, 1333 (1976) (denying application for stay of remand order because "while the District Court may have been wrong in its analysis, it clearly stated, citing to section 1447(c), that it was without jurisdiction."); *Kromer v. McNabb*, 308 F.2d 863, 865-66 (10th Cir. 1962) (application for stay of remand order based on lack of subject matter jurisdiction denied "as contrary to the policy and terms of 28 U.S.C. 1447(d)").

That being said, an exception to the application of § 1447(d) exists. Reviewable, non-§ 1447(c) remands constitute a narrow class of cases in which a court may review a remand order if the district court clearly and affirmatively relies on a non-§ 1447(c) basis. *See Heaton v. Monogram Credit Card Bank of Georgia*, 231 F.3d 994, 997 (5th Cir. 2000). In this regard, the Defendants and

Cross-Defendant Powerex contend that the Court's ruling on the immunity status of the parties under the FSIA is a "separable order" reviewable apart from the decision to remand.

The notion that certain orders may be reviewed on appeal if such orders are "separable" from the order of remand originated with the Supreme Court's decision in *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934).[1] In determining whether an order is "separable" and, thus, can be afforded appellate review under *City of Waco*, courts have focused on whether the underlying findings and determinations on which a remand order is based (1) have significance or consequences beyond jurisdictional issues; and (2) will not be subject to review in the state court proceedings after remand. *See, e.g., Aquamar v. Del Monte Fresh Produce*, 179 F.3d 1279, 1286 (11th Cir. 1999).

Yet, there is no separable order at issue here. A plain and common sense review of the Court's remand order shows that the Court only stated a § 1447(c) basis for remand (Ct. Rec. 202, stating, "The issue hinges, then, on the Court's jurisdictional authority to hear the removed claims."). The Court's findings that (1) Powerex is not a foreign sovereign for purposes of the FSIA; (2) that BPA and WAPA possess sovereign immunity; and (3) that the

---

[1] In *City of Waco*, in a single order, the district court denied plaintiff's motion to remand the entire case, but granted a motion to dismiss a cross-action. Because this dismissal eliminated diversity jurisdiction, the court remanded the remainder of the case for lack of subject matter jurisdiction. 293 U.S. at 142. The Supreme Court eventually determined that the remand order did not preclude appellate review of the dismissal order, stating:

> True, no appeal lies from the order of remand; in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. Indisputably, this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the [city of Waco].

Id.

derivative jurisdiction doctrine bars the Court from asserting jurisdiction over the cross-claims against the United States upon removal were not collateral, but integral to the Court's jurisdictional determination. *Cf. Hansen v. Blue Cross of Calif.*, 891 F.2d 1384, 1387-88 (9th Cir. 1989) (stating "[appellant] fails to demonstrate how the district court's legal decision was apart from the question of subject matter jurisdiction as required to fall within the exception to nonreviewability. . . . The district court's decision . . . rather than being apart from the question of subject matter jurisdiction, was necessary to determine whether such jurisdiction existed."). In light of the Court's ultimate conclusion that the entire case has to be remanded for lack of subject matter jurisdiction, the Court's determination that the Cross-Defendants are immune under the FSIA is a jurisdictional finding. As such, granting a stay of remand under the "separable order" exception to nonreviewability is inappropriate in these circumstances.

In this regard, the cases cited by Defendants and Cross-Defendant Powerex supporting their "separable order" argument are distinguishable from this case in one major regard: all of those cases involved actual entry of a dismissal order in conjunction with, or prior to, entry of the remand order, or remands that were reviewable because they were based on something other than lack of jurisdiction. *See, e.g., City of Waco*, 293 U.S. 140 (1934) (district court entered order of dismissal along with remand order); *Gallea v. United States*, 779 F.2d 1403 (9th Cir. 1986) (district court entered order dismissing government as party, then remanded case). Perhaps not surprisingly, then, it is no shock that Cross-Defendants have asked this Court to clarify its order so as to dismiss BC Hydro from the case based on the Court's finding that BC Hydro is immune from suit.[2] *See* December 17, 2002 letter from

[2] The United States, likewise, has made a similar motion, asking that the Court clarify its remand order and dismiss it from the case based on the Court's finding that it is immune from suit. (Ct. Rec. 211.)

Douglas M. Butz, counsel for B.C. Hydro, to this Court. If the Court were to clarify its Order and dismiss B.C. Hydro, the Court's remand order would, arguably, be reviewable under the "separable order" exception.

It would be improper, however, for the Court to grant Cross-Defendant B.C. Hydro's request to dismiss it from the case at this point. Several courts have held that when a district court has determined that it lacks subject matter jurisdiction over a removed claim, the appropriate procedure is to remand the claim to state court, rather than dismiss the claim. *See, e.g., Smith v. Wisconsin Dept. of Agriculture, Trade, & Consumer Prot.*, 23 F.3d 1134, 1138-39 (7th Cir. 1994). The Fourth Circuit made this point clear in *Roach v. West Virginia Regional Jail & Corr. Facility Auth.*, 74 F.3d 46, 48-49 (4th Cir. 1996), stating:

> Remand to state court following removal is governed by 28 U.S.C.A. § 1447, and the statute is clear and unambiguous. "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, *the case shall be remanded*." 28 U.S.C.A. § 1447(c) (emphasis added). The plain language of § 1447(c) gives "no discretion to dismiss rather than remand an action" removed from state court over which the court lacks subject-matter jurisdiction.

(Emphasis in the original; internal citations omitted). Thus, applying the above principles, it is evident that it would be error for the Court to dismiss Cross-Defendant B.C. Hydro from the case, rather than simply remanding. Section 1447(c) requires the Court to simply remand the action to state court.

Defendants also request the appointment of a special process server to effect service on Cross-Defendant Comision Federal de Electricidad. Again, having already found that the Court lacks subject matter jurisdiction over this case, it is inappropriate to grant Defendants' service request as well.

Accordingly, **IT IS HEREBY ORDERED**:

1. Defendants Duke Energy's and Reliant Energy's *Ex Parte* Application for Stay of the Court's Remand Order **(Ct. Rec. 201)** and Cross-Defendant Powerex Corp.'s ("Powerex') *Ex Parte* Application for Stay of the Court's Remand Order **(Ct. Rec. 204)** are **DENIED**.

2. Cross-Defendant Powerex's Motion for Reconsideration **(Ct. Rec. 214)** shall be heard without oral argument on February 7, 2003. All responses to the motion for reconsideration are to be filed no later than January 31, 2003. Cross-Defendant Powerex's reply shall be filed no later than February 5, 2003.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel.

DATED this 24th day of January, 2003.

/s/ ROBERT H. WHALEY
Robert H. Whaley
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Coordination Proceeding
Special Title (Rule 1550(b))

Nos. CV 02-0990-RHW
CV 02-1000-RHW
CV 02-1001-RHW

WHOLESALE ELECTRICITY
ANTITRUST CASES I & II

This Document relates to:

ALL ACTIONS

RELIANT ENERGY SERVICES, INC., ET AL.,
Defendants and Cross-Complainants,

v.

ARIZONA ELECTRIC POWER COOPERATIVE, INC., ET AL.,
Cross-Defendants.

ORDER DENYING UNITED STATES' MOTION FOR CLARIFICATION OF ORDER GRANTING MOTION TO REMAND

Before the Court is Cross-Defendant United States' Motion for Clarification of Order Granting Motion to Remand. (Ct. Rec. 211.) The United States maintains that implicit to the holding in the Court's Remand Order of December 17, 2002 (Ct. Rec. 202) is that no jurisdiction exists over BPA and WAPA, and, thus, dismissal of the federal cross-defendants, rather than remand to state court, is warranted.

It would be improper, however, for the Court to grant Cross-Defendant United States' request to dismiss the federal defendants from the case at this point. The reasoning the Court employed in its Order Denying Ex Parte

Application of Remand Order applies with equal force here. (Ct. Rec. 202). As noted in the previous order, several courts have held that when a district court has determined that it lacks subject matter jurisdiction over a removed claim, the appropriate procedure is to remand the claim to state court, rather than dismiss the claim. *See, e.g., Smith v. Wisconsin Dept. of Agriculture, Trade, & Consumer Prot.*, 23 F.3d 1134, 1138-39 (7th Cir. 1994). The Fourth Circuit made this point clear in *Roach v. West Virginia Regional Jail & Corr. Facility Auth.*, 74 F.3d 46, 48-49 (4th Cir. 1996), stating:

> Remand to state court following removal is governed by 28 U.S.C.A. § 1447, and the statute is clear and unambiguous. "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, *the case shall be remanded*." 28 U.S.C.A. § 1447(c) (emphasis added). The plain language of § 1447(c) gives "no discretion to dismiss rather than remand an action" removed from state court over which the court lacks subject-matter jurisdiction.

(Emphasis in the original; internal citations omitted.) Thus, applying the above principles, it is evident that it would be error for the Court to dismiss the federal defendants from the case, rather than simply remanding. Section 1447(c) requires the Court to simply remand the action to state court.

Accordingly, **IT IS HEREBY ORDERED** that Cross-Defendant United States' Motion for Clarification of Order Granting Motion to Remand (Ct. Rec. 211) is **DENIED**.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel.

DATED this 31st day of January, 2003.

/s/ ROBERT H. WHALEY
Robert H. Whaley
United States District Judge

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

January 19, 2007

Mr. David C. Frederick
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.
1615 M St eet, N.W.
Suite 400
Washington, DC 20036

Re: Powerex Corp.
v. Reliant Energy Services, Inc., et al.
No. 05-85

Dear Mr. Frederick:

The Court today entered the following order in the above-entitled case:

The motion of Province of British Columbia for leave to file a brief as *amicus curiae* is granted. The motion of Government of Canada for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is granted limited to Question 1 presented by the petition. In addition, the parties are directed to brief and argue the following Question: Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U. S. C. Sec. 1447(d).

Sincerely,

/s/ WILLIAM K. SUTER
William K. Suter, Clerk

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FILED
FEB 16 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-85

IN THE

Supreme Court of the United States

POWEREX CORP.,
Petitioner,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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Counsel for Powerex Corp.

February 16, 2007

QUESTIONS PRESENTED

1. Whether an entity that is wholly and beneficially owned by a foreign state's instrumentality, and whose sole purpose is to perform international treaty and trade agreement obligations for the benefit of the foreign state's citizens, may nonetheless be denied status as an "organ of a foreign state" under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603(b)(2), based on an analysis of sovereignty that ignores the circumstances surrounding the entity's creation, conduct, and operations on behalf of its government.

2. Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. § 1447(d).

PARTIES TO THE PROCEEDINGS

Petitioner Powerex Corp. was a cross-defendant/appellant/appellee in the district court and court of appeals proceedings.

The following also were parties to the district court and court of appeals proceedings and are respondents in this Court:

AES Corporation was a defendant

AES Redondo Beach, LLC was a defendant

AES Alamitos, LLC was a defendant

AES Huntington Beach, LLC was a defendant

Arizona Electric Power Cooperative, Inc. was an intervenor/cross-defendant/appellee

Arizona Public Service Company was a cross-defendant/appellee

Automated Power Exchange, Inc. was a cross-defendant/appellee

Avista Energy, Inc. was an intervenor/cross-defendant/appellee

Bonneville Power Administration was a cross-defendant/appellant/appellee

Borrego Water District was a plaintiff

British Columbia Hydro and Power Authority was a cross-defendant/appellee

Cruz M. Bustamante was a plaintiff/appellee

Cabrillo Power I, LLC was a defendant/appellee

Cabrillo Power II, LLC was a defendant/appellee

City and County of San Francisco was a plaintiff

City of Los Angeles Department of Water and Power was a cross-defendant/appellee

City of Oakland was a plaintiff

Commission de Federale Electricidad was a cross-defendant/appellee

Constellation Power Source (now Constellation Energy Commodities Group) was a cross-defendant/appellee

County of Santa Clara was a plaintiff

Mary L. Davis was a plaintiff

Department of Energy was a cross-defendant/appellee

Duke Energy Morro Bay, LLC was a defendant/cross-claimant/appellant/appellee

Duke Energy Moss Landing, LLC was a defendant/cross-claimant/appellant/appellee

Duke Energy Oakland, LLC was a defendant/cross-claimant/appellant/appellee

Duke Energy South Bay, LLC was a defendant/cross-claimant/appellant/appellee

Duke Energy Trading and Marketing, LLC was a defendant/cross-claimant/appellant/appellee

Dynegy, Inc. was a defendant

Dynegy Marketing and Trade was a defendant

Dynegy Power Marketing, Inc. was a defendant

El Segundo Power, LLC was a defendant/appellee

Fallbrook Public Utility District was a plaintiff

General Public of the State of California was a plaintiff/appellee

Pamela R. Gordon was a plaintiff/appellee

Hafslund Energy Trading LLC was a cross-defendant/appellee

Helix Water District was a plaintiff

Ruth Hendricks was a plaintiff/appellee

IDACORP Energy, L.P. was an intervenor/cross-defendant/appellee

Idaho Power Company was an intervenor/cross-defendant/appellee

Patrick N. Keegan was a plaintiff/appellee

Long Beach Generation, LLC was a defendant/appellee

Barbara Mathews was a plaintiff/appellee

Metropolitan Transit Development Board was a plaintiff

MIECO, Inc. was a cross-defendant/appellee

Mirant Americas Energy Marketing L.P. (fka Southern Company Energy Marketing, L.P.) was a defendant

Mirant California, LLC (fka Southern Energy California, LLC) was a defendant

Mirant Delta, LLC (fka Southern Energy Delta, LLC) was a defendant

Mirant, Inc. (fka Southern Energy, Inc.) was a defendant

Mirant Potrero, LLC (fka Southern Energy Potrero, LLC) was a defendant

Morgan Stanley Capital Group Inc. was a defendant

Nevada Power Company was a cross-defendant/appellee

Northern California Power Agency was an intervenor/cross-defendant/appellee

NRG Energy, Inc. was a defendant/appellee

Oscar's Photo Lab was a plaintiff

PacifiCorp was a cross-defendant/appellee

PacifiCorp Power Marketing Inc. was a cross-defendant/appellee

Padre Dam Municipal Water District was a plaintiff

People of the State of California was a plaintiff/appellee

PG&E Energy Trading Holdings Corporation was a defendant

PG&E Energy Trading-Power, L.P. was a defendant

Pier 23 Restaurant was a plaintiff/appellee

Plant General Electric Company was a cross-defendant

Portland General Electric Company was a cross-defendant/appellee

PP&L Montana, LLC was a cross-defendant/appellee

Public Service Company of New Mexico was a cross-defendant/appellee

Puget Sound Energy, Inc. was an intervenor/cross-defendant/appellee

Ramona Municipal Water District was a plaintiff

Reliant Energy Coolwater, Inc. (fka Reliant Energy Coolwater, LLC) was a defendant/cross-claimant/appellant/appellee

Reliant Energy Ellwood, Inc. (fka Reliant Energy Ellwood, LLC) was a defendant/cross-claimant/appellant/appellee

Reliant Energy Etiwanda, Inc. (fka Reliant Energy Etiwanda, LLC) was a defendant/cross-claimant/appellant/appellee

Reliant Energy Mandalay, Inc. (fka Reliant Energy Mandalay, LLC) was a defendant/cross-claimant/appellant/appellee

Reliant Energy Services, Inc. was a defendant/cross-claimant/appellant/appellee

Reliant Ormond Beach, Inc. (fka Reliant Ormond Beach, LLC) was a defendant/cross-claimant/appellant/appellee

Sacramento Municipal Utility District was an intervenor/cross-defendant/appellee

Salt River Project Agricultural Improvement and Power District was an intervenor/cross-defendant/appellee

San Diego Transit Corporation was a plaintiff

San Diego Trolley, Inc. was a plaintiff

Sempra Energy, Inc. was a defendant/appellee

Sempra Energy Resources was a defendant/appellee

Sempra Energy Trading was a defendant/appellee

Sierra Pacific Industries was an intervenor/cross-defendant/appellee

Sierra Pacific Power Company was a cross-defendant/appellee

Sierra Pacific Resources was a cross-defendant/appellee

Silicon Valley Power (City of Santa Clara) was an intervenor/cross-defendant/appellee

Sunlaw Cogeneration Partners I (now Sunlaw Energy Partners I, L.P.) was a cross-defendant/appellee

Sweetwater Authority was a plaintiff/appellee

Trans Alta Energy Marketing Company was an intervenor/cross-defendant/appellee

Trans Canada Power Company was a cross-defendant

Tucson Electric Power Company was an intervenor/ cross-defendant/appellee

United States of America was a cross-defendant/appellee

Valley Center Municipal Water District was a plaintiff

Vista Irrigation District was a plaintiff

Western Area Power Administration, Colorado River Storage Project, was a cross-defendant/appellee

The Williams Companies, Inc. was a defendant

Williams Energy Marketing & Trading Co. was a defendant

Williams Energy Services Co. was a defendant

Yuima Municipal Water District was a plaintiff

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Powerex Corp. states the following:

Powerex Corp. is a Canadian corporation that is wholly owned by the British Columbia Hydro and Power Authority, which is a Provincial Crown Corporation owned in its entirety by Her Majesty the Queen in right of the Province of British Columbia. No publicly held company owns any Powerex stock.

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INTRODUCTION

More than six decades ago, the United States and Canadian governments began to work together to harness the ravaging powers and potential benefits of the Columbia River system, which traverses both nations and is one of the largest watersheds in North America. Those efforts culminated in 1961 in the Columbia River Treaty, a pact that committed both nations to working together to construct dams, establish reservoirs, develop hydropower-generation capabilities, and coordinate flood-control efforts. Because the United States was to be the principal beneficiary of the dam projects and reservoirs built on the Canadian side of the boundary, the United States agreed to reimburse Canada for decades with half of the electricity generated on the American side. That power created a substantial benefit that Canada ultimately transferred to British Columbia, in exchange for the Province's commitment of public resources to the construction of the necessary water-control facilities.

Blessed with a citizenry willing to devote public tax dollars to fulfilling that joint governmental mission and large quantities of hydropower generated by new facilities on British Columbia rivers, the Province began marketing its hydropower to the United States. In 1988, the Provincial government created Powerex to serve as its "export agency" for marketing Provincial power to United States wholesale purchasers. Since its inception, Powerex has been wholly owned by the Province's statutory agent, BC Hydro (itself wholly owned by the Province), has generated revenues that are consolidated with those of BC Hydro and then transferred to the Province, has operated under Provincial laws that apply only to governmental entities, and has fulfilled international obligations assigned to it by the Province.

In holding that Powerex was not an "organ" of British Columbia under the Foreign Sovereign Immunities Act of 1976, the Ninth Circuit disregarded the wide range of factors that properly denominate Powerex's status, and it

placed great weight on several factors that contradict the Act's text and structure. Its judgment therefore should be reversed.

The Ninth Circuit had appellate jurisdiction, notwithstanding 28 U.S.C. § 1447(d). The district court's remand order did not specify that it was based on a lack of subject-matter jurisdiction, nor could it. It is well settled that, when a federal agency or foreign sovereign removes a case, the court has jurisdiction over the entire case, including claims against defendants that are not federal agencies or federal sovereigns. Accordingly, the district court had discretion to adjudicate or to remand the claims against Powerex. Under this Court's well-settled precedent, the proscription against appeal under § 1447(d) does not apply in this context. Moreover, because of the special dignity and foreign-policy interests associated with determining a foreign sovereign's status, this Court should not construe § 1447(d) as foreclosing the right of appeal when a district court erroneously denies the organ status of a foreign sovereign.

OPINIONS BELOW

The district court's opinion granting the remand motion (Pet. App. 18a-44a) is unreported. The court of appeals' opinion (*id.* at 1a-17a) is reported at 391 F.3d 1011.

JURISDICTION

The court of appeals entered its judgment on December 8, 2004. A petition for rehearing was denied on March 3, 2005. Pet. App. 45a. On May 23, 2005, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including July 1, 2005, *id.* at 215a, and on June 22, 2005, further extended the time for filing to and including July 15, 2005, *id.* at 216a. The petition for a writ of certiorari was filed on July 15, 2005, and was granted on January 19, 2007 (JA 290). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

TREATY & STATUTORY PROVISIONS INVOLVED

Relevant treaty and statutory provisions are set forth in the petition appendix and the addendum to this brief.

STATEMENT OF THE CASE

The Columbia River, BC Hydro, and Powerex

In the mid-1940s, the United States and Canada began a concerted effort jointly to develop the resources of the Columbia River Basin, which spans the Pacific Northwest region of the two nations. That process ultimately led to British Columbia's decision to create Powerex for the purpose of exporting Provincial hydroelectric power. Subsequently, the Province decided to use Powerex to market power received from the United States under the Columbia River Treaty. A proper understanding of Powerex's status as an organ of British Columbia requires a brief history of those developments.

1. The Columbia River begins in British Columbia at the western foot of the Rocky Mountains and travels 1,214 miles before emptying into the Pacific Ocean near Astoria, Oregon. *See* Federal Columbia River Power System, *The Columbia River System Inside Story* 4 (2d ed. 2001) ("*Inside Story*"), *available at* http://www.bpa.gov/power/pg/columbia_river_inside_story.pdf. With its steep descent, numerous tributaries, and favorable climate, the Columbia Basin presents a series of environmental challenges and economic opportunities. The challenges stem from the difficulty of harnessing river waters in flood conditions – in 1894 and 1948, the Columbia Basin experienced severe flooding, sparking calls for construction of multipurpose dam projects to prevent future floods. Such projects also create economic opportunities, through irrigation and hydroelectric power generation. *See* Neil A. Swainson, *Conflict Over the Columbia: The Canadian Background to an Historic Treaty* 27-28, 42 (1979) ("Swainson")[1]; John V. Krutilla, *The Columbia River*

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[1] *See also* Swainson at 42 ("The torrent of waters in that year [1948] breached the dykes on the Kootenay River south of Kootenay Lake in

Treaty: The Economics of an International River Basin Development 15, 19 (1967) ("Krutilla"); *Inside Story* at 34.

Because the Columbia's flows are primarily snow-fed and thus fluctuate drastically between seasons, variations in water runoff create special challenges for hydropower generation. Excess electricity produced during peak flows cannot be easily stored, and periods of low river discharge result in power shortages. The solution to those problems was to build upstream dams and reservoirs, in which large quantities of river water could be stored and released in a controlled manner, promoting the efficient generation of hydroelectric power and reducing flooding. *See Inside Story* at 4-5; Krutilla at 19, 32.

In 1909, the United States and Great Britain (on behalf of Canada) entered into the Boundary Waters Treaty,[2] which was designed to prevent disputes over the use of waters located on or flowing across the United States–Canada border and to establish a mechanism, known as the International Joint Commission ("IJC"), to facilitate further collaboration.[3] After the dam-building boom of the New Deal era, and in light of catastrophic flooding on the Columbia, the United States and Canada opened a dialogue on how to develop the natural resources of the Columbia Basin in a mutually beneficial way. Together, the two nations asked the IJC to analyze the feasibility as well as costs and benefits to each country of further

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Canada and the United States; it inundated part of Trail, B.C.; and, in the United States, it took fifty lives and caused property damage in excess of a hundred million dollars. As might be expected, the disaster evoked a number of plans designed to prevent a recurrence.").

[2] Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada, Jan. 11, 1909, 36 Stat. 2448 ("Boundary Waters Treaty").

[3] *See generally Inside Story* at 5 ("Beginning in 1909, the Columbia River has been harnessed for the benefit of the U.S. Pacific Northwest and the Canadian Pacific Southwest.").

development of the Columbia River.[4] After a lengthy investigation, the IJC published its findings, concluding that there were "possibilities for cooperative development in the Columbia Basin that could be of mutual advantage to the two countries."[5] The IJC also recognized that the United States would benefit more from developing the Columbia's resources for hydroelectric power generation and flood control than would Canada.[6]

That dialogue culminated in 1961, when the United States and Canada signed the Columbia River Treaty.[7] Under the treaty, Canada agreed to build dams and reservoir facilities on the Canadian side of the border to control the flow of the Columbia River. Those dams and reservoirs enabled the United States to generate more hydroelectric power and to reduce flooding on its side of the border. *See* Columbia River Treaty Art. II (Pet. App. 63a-64a); Pet. App. 51a (Peterson Decl.). In return, Canada received a right to one-half of the increased generation capacity that would be realized in the United States. *See id.* Art. V, § 1 (Pet. App. 66a); Pet. App. 51a (Peterson

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[4] *See* Reference from the Canadian and United States Governments to the International Joint Commission (Canadian Note) (Mar. 9, 1944), *reprinted in* The Columbia River Treaty Protocol and Related Documents, Issued by the Canada Departments of External Affairs and Northern Affairs and National Resources at 17 (Queen's Printer, Ottawa, Feb. 1964) ("Columbia River Treaty Protocol and Related Documents"); Keith W. Muckleston, *International Management in the Columbia River System* 25 (UNESCO PCCP, 2003), *available at* http://unesdoc.unesco.org/images/0013/001332/133292e.pdf.

[5] Report of the International Joint Commission on Principles for Determining and Apportioning Benefits From Cooperative Use of Storage of Waters and Electrical Interconnection Within the Columbia River System (Dec. 29, 1959), *reprinted in* Columbia River Treaty Protocol and Related Documents at 39.

[6] *See id.* at 40.

[7] Treaty Between the United States of America and Canada Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, 15 U.S.T. 1555 ("Columbia River Treaty") (Pet. App. 61a-137a).

Decl.). In recommending ratification of the treaty, the Senate Foreign Relations Committee recognized that the treaty would "provide great benefits to the United States and Canada in power, flood control, irrigation and other water uses – far greater benefits than either country could have if it attempted to act alone" – and that the "United States is indeed fortunate to have a neighbor to the north willing and able to cooperate in great constructive enterprises of this kind which tend to draw the two countries ever more closely together." Columbia River Treaty, S. Exec. Rep. No. 2, at 8 (1961).

In the immediate aftermath of the treaty's signing, a few important issues needed to be resolved. The Canadian federal government negotiated with the government of British Columbia over which of the two would bear responsibility for implementing Canada's obligations under the treaty (and receive the resulting benefits). *See* Pet. App. 50a-52a (Peterson Decl.). As negotiations between Canada and British Columbia progressed, the United States and Canada recognized a need to implement the treaty in a manner that reflected the Province's anticipated role. Rather than amending the treaty, Prime Minister Pearson met with President Kennedy at Hyannis Port in May 1963 and announced that negotiations would resume shortly to produce a "protocol" outlining "clarifications and adjustments" in the treaty's terms.[8]

In July 1963, the Canadian and Provincial governments entered into an agreement under which the Province agreed to perform several of Canada's obligations under the treaty and, in return, the Province would receive many of Canada's benefits under the treaty – including the right to one-half of the United States' increased

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[8] Excerpt from Joint Communiqué Issued 11 May 1963 by the Office of the Primer Minister and the Office of the White House Press Secretary Following Meetings Between President John F. Kennedy and Prime Minister Lester B. Pearson at Hyannis Port, Massachusetts, 10-11 May 1963, *reprinted in* Columbia River Treaty Protocol and Related Documents at 99.

hydropower-generation capacity. *See id.* at 51a (Peterson Decl.).[9] In January 1964, the United States and Canada agreed to the treaty protocol, which provided additional detail on the treaty's implementation. *See id.* at 93a-100a. At about the same time, Canada and the United States agreed that the United States would pay Canada a lump sum of money to cover the first 30 years of its obligation to reimburse Canada for increased generation capacity. *See id.* at 52a (Peterson Decl.), 101a-117a, 119a-132a. Canada, in turn, assigned that payment to the Province. *See id.* at 52a (Peterson Decl.).[10]

The Columbia River Treaty required Canada and the United States to appoint "entities" to administer its obligations. *See* Art. XIV, § 1 (Pet. App. 74a). The United States designated Bonneville Power Administration ("BPA") and the Army Corps of Engineers, collectively, as the United States entity responsible for administering the treaty. *See* Pet. App. 55a (Peterson Decl.); *id.* at 133a (Executive Order). Canada designated the British Columbia Hydro and Power Authority ("BC Hydro"), a Provincial Crown Corporation created by British Columbia in 1964. *See id.* at 50a-52a (Peterson Decl.); *id.* at 118a (minutes of Privy Council meeting). BC Hydro (and its predecessor entity) played an important role in negotiations regarding (1) the Protocol to the Columbia River Treaty, (2) the payment by the United States that satisfied the first 30 years of its obligation to compensate Canada for increased generation, and (3) the Canada–British Columbia agreements to implement the treaty. *See id.* at 52a (Peterson Decl.).

On September 16, 1964, President Johnson and Prime Minister Pearson met and formally ratified the Columbia River Treaty and Protocol. *See* Swainson at 1. That event marked the conclusion of a 20-year dialogue – spanning the terms of five United States Presidents and four

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[9] *See* Canada–British Columbia Agreement §§ 2-3 (July 8, 1963).

[10] *See* Canada–British Columbia Agreement (Jan. 13, 1964).

Canadian Prime Ministers – between the United States and Canada as well as Canada and British Columbia. And it allowed the massive construction projects required to implement the agreement to begin.

2. In enacting the British Columbia Hydro and Power Authority Act, which created BC Hydro, the Provincial government's goal was to establish an entity to maximize the Province's hydroelectric production capacity. *See* Pet. App. 7a; *id.* at 50a (Peterson Decl.).[11] BC Hydro has fulfilled that sovereign objective by building dams, developing storage capacity, and operating hydroelectric generating facilities. *See id.* at 50a, 52a. The Province also used BC Hydro to build the facilities required under the Columbia River Treaty, and BC Hydro continues to be responsible for implementation of the treaty. *See id.* at 52a.

As a result of BC Hydro's development activities, the Province's generating capacity for a period of time exceeded the Province's electricity needs. Consequently, BC Hydro became an active seller of power at the border to buyers in the United States, principally BPA. *See id.* at 53a. Those sales furthered the Province's goal of maximizing the benefits of its hydroelectric resources. BC Hydro also distributes electricity to the citizens of British Columbia. *See id.* at 59a.

As a Provincial Crown Corporation, BC Hydro is owned entirely by Her Majesty the Queen in right of the Province of British Columbia, by which name the Province is formally known. *See id.* at 58a. The legislation that created BC Hydro enumerated its powers – including powers not generally available to private companies in British Columbia – and provided specifically that BC Hydro "is for all its purposes an agent of the government and its

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[11] Since its creation in 1964, BC Hydro has been "continued" by statute numerous times. *See* Power Measures Act, S.B.C., ch. 40 (1964); Power Measures Act, S.B.C., ch. 38 (1966); Hydro and Power Authority Act, R.S.B.C., ch. 188 (1979); Hydro and Power Authority Act, R.S.B.C., ch. 212 (1996) ("Hydro Act").

powers may be exercised only as an agent of the government." Hydro Act § 3(1) (Pet. App. 166a). All substantive powers of BC Hydro are subject to, and can only be exercised with, the approval of the Lieutenant Governor in Council or the Provincial Minister responsible for BC Hydro. *See* Pet. App. 59a (Peterson Decl.).[12]

3. In the late 1980s, the Province decided to create a governmental entity to optimize its hydroelectric resources through exports, including the export of surplus hydroelectric power created as a result of BC Hydro's construction projects. *See* Pet. App. 53a (Peterson Decl.). In debates, members of the British Columbia legislative assembly expressed opposition to any subsidization of export activities through BC Hydro's retail utility rates. *See* JA 198-99. The Province's Minister of Energy responded by assuring that the "export opportunity . . . should be . . . separated from the service to British Columbians" and that "[i]n no way" should BC Hydro's retail utility rates include export costs. JA 201. The minister stated that the "export agency . . . will begin its life . . . as a subsidiary of B.C. Hydro." *Id.* He explained that "[t]he reason for creating an agency – a single marketing desk, if I can describe it that way – is . . . to drive a good bargain in the U.S.A. . . . . We sell from strength, in other words." *Id.*

Following the preparation of a Cabinet submission on the issue, the energy minister issued a written directive to BC Hydro, explaining that "Cabinet has decided that we should provide a single window agency to be responsible to market the export of power outside the province and

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[12] "Lieutenant Governor in Council" refers to the Lieutenant Governor of British Columbia acting on and with the advice of the Executive Council or Cabinet of British Columbia. *See* British Columbia Government House website, FAQs, *at* http://www.ltgov.bc.ca/faq. "When the Cabinet makes a decision and it has been approved by the Lieutenant Governor, it is said to have been made by the Lieutenant Governor in Council." *Id.* "The Lieutenant Governor is the representative of Her Majesty The Queen of Canada in the Province of British Columbia." *Id.*, Role, *at* http://www.ltgov.bc.ca/office/role.htm.

that this entity should be a wholly owned subsidiary of B.C. Hydro." JA 267. The minister directed BC Hydro "to incorporate the Export Agency." *Id.* In December 1988, BC Hydro – acting as the Province's agent – incorporated Powerex, which was originally known as the "British Columbia Power Export Corporation," as its wholly owned subsidiary. *See* Pet. App. 53a (Peterson Decl.); JA 230-31 (Peterson Dep.).

From its inception, Powerex has performed functions prescribed by Provincial officials. Initially, Powerex took delivery of British Columbia's surplus electricity and sold it at the border to purchasers in the United States and Alberta. *See* Pet. App. 53a-54a (Peterson Decl.). Subsequently, the Province decided to use Powerex to maximize the benefits of the Columbia River Treaty. As noted, the United States paid a lump sum to cover the first 30 years of its obligation to compensate Canada for increased generation capacity. *See supra* p. 7. Near the end of those 30 years (in the mid-1990s), officials of Powerex participated with BC Hydro in negotiations with the Corps of Engineers and BPA to address how the United States' remaining obligation would be satisfied. *See* Pet. App. 55a (Peterson Decl.). Those parties reached an agreement requiring the United States to satisfy its treaty obligation by providing electricity, a benefit that inured to the Province under agreements between the Province and Canada. The Province and BC Hydro, in turn, transferred their rights, title, and interest in the agreement to Powerex. *See id.*; JA 133-55 (Entitlement Assignment Agreement).

Powerex markets the power received from the United States under the Columbia River Treaty, with the objective of maximizing its value to the Province. *See* Pet. App. 55a (Peterson Decl.).[13] The United States' obligation un-

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[13] *See* Powerex website, Our Resources ("Powerex is responsible for marketing the highly reliable . . . power [received from the United States under the Columbia River Treaty] on behalf of the BC government."), *at* http://www.powerex.com/about/resources.htm.

der the Columbia River Treaty is Powerex's largest single external source of power. JA 250-51 (Peterson Dep.). Powerex pays the Province directly for power it receives from the United States. *See* JA 140 (Entitlement Assignment Agreement); *see also* JA 264 (Peterson Dep.).

In 1997, Powerex received authorization from the Federal Energy Regulatory Commission to sell wholesale electricity in the United States at market-based rates.[14] Powerex has entered into transmission arrangements with United States utilities; it participates in United States wholesale electricity markets; and it acts as both an exporter and an importer of power. Powerex's participation in wholesale electricity markets within the United States allows the Province to maximize the value of its hydroelectric resources by exporting energy when available and, when necessary, importing energy to replenish depleted Provincial reservoirs. *See* Pet. App. 58a (Peterson Decl.); JA 235-37, 238-39 (Peterson Dep.).[15] No other entity imports power for the benefit of BC Hydro.

Powerex also performs Provincial obligations under the United States–Canadian Skagit River Treaty[16] and the British Columbia–Seattle Agreement (Mar. 30, 1984) (JA 160-71). *See* Pet. App. 56a (Peterson Decl.). Under the British Columbia–Seattle Agreement, the provisions of which were confirmed by the Skagit River Treaty, the City of Seattle agreed not to raise the High Ross Dam, which would have had the effect of flooding substantial

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[14] *See British Columbia Power Exch. Corp.*, 80 FERC ¶ 61,343 (1997).

[15] *See also* JA 206 (Report on Export Trade) ("BC Hydro's primary objective is to provide low-cost, reliable electricity supply to domestic customers. Within this context, Powerex's activities are designed to support optimal economic utilization of BC Hydro's electricity assets by using non-committed generation capability to earn income.").

[16] Treaty Between Canada and the United States of America Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D'Oreille River, Apr. 2, 1984, T.I.A.S. No. 11088, 1469 U.N.T.S. 309 (Pet. App. 138a-146a).

areas of British Columbia. *See id.* In exchange, British Columbia agreed to deliver substantial quantities of electricity to Seattle through 2066. *See id.* The Province assigned many of its benefits and obligations under that agreement to BC Hydro. *See id.* In the late 1990s, Powerex took the lead in renegotiating transmission arrangements for electricity delivered to Seattle. *See id.* at 56a-57a; JA 172-89 (transmission agreement between BC Hydro and Seattle). BC Hydro subsequently delegated to Powerex operating responsibilities under the resulting transmission agreements, making Powerex responsible for arranging the transmission and delivery of power to Seattle to meet the Province's international obligations under the British Columbia–Seattle Agreement. *See* Pet. App. 57a (Peterson Decl.); JA 259 (Peterson Dep.); JA 190-94 (BC Hydro–Powerex Assignment Agreement). In addition, Powerex entered into an agreement with BPA under which Powerex agreed to pay BPA to deliver electricity to Seattle in the event that transmission difficulties prevented Powerex from supplying power as required. *See* Pet. App. 57a (Peterson Decl.). That Powerex contract further assured that the Province's obligations under the British Columbia–Seattle Agreement would be fulfilled.

As explained in greater detail below (*see infra* Part I.B), Powerex's earnings are consolidated with those of BC Hydro, which annually pays up to 85 percent of its consolidated net income directly to the Province, with the remaining income being reinvested in BC Hydro and Powerex. The Province supervises Powerex in a variety of ways. The Lieutenant Governor in Council (the Executive Council of the Province) directly appoints BC Hydro's board of directors, which, in turn, appoints Powerex's board (and the majority of Powerex's board consists of BC Hydro board members). Powerex is subject to extensive financial regulations that apply only to governmental entities. Further, Powerex's employment-compensation decisions conform to Provincial constraints, and Powerex's

export activity has been a subject of political debate and public concern in the Province.

Powerex enjoys significant benefits under Canadian and British Columbia law. It does not pay Canadian or Provincial income taxes, and its commercial arrangements are frequently supported by BC Hydro guarantees, which permit Powerex to benefit from BC Hydro's credit rating, which is equal to that of the Province. Unlike private businesses, Powerex is eligible to receive financial benefits from the Province, and Powerex's employees participate in BC Hydro's pension plan.

Statutory Framework

1. The Foreign Sovereign Immunities Act of 1976[17] ("the FSIA" or "the Act") governs litigation against "foreign state[s]," including their "agenc[ies]" and "instrumentalit[ies]." 28 U.S.C. § 1603(a); *see Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989) ("the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country"). The Act affords numerous jurisdictional and procedural protections to foreign states and their agencies and instrumentalities, *see* 28 U.S.C. §§ 1391(f), 1441(d), 1604, 1606, 1608-1609, 1611, including the right to remove suits brought against them in state court to federal court. Under § 1441(d), "[a]ny civil action brought in a State court against a foreign state as defined in [the FSIA] may be removed by the foreign state to [federal] district court," where the case is tried without a jury. *Id.* § 1441(d).

Under the FSIA, a "foreign state" entitled to remove to federal court under § 1441(d) includes any "agency or instrumentality of a foreign state." *Id.* § 1603(a). Section 1603(b) in turn defines an "agency or instrumentality of a foreign state" as any entity that (1) "is a separate legal person, corporate or otherwise"; (2) "is an organ of a foreign state or political subdivision thereof" or "a majority

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[17] Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1441(d), 1602-1611).

of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof"; and (3) "is neither a citizen of a State of the United States" nor "created under the laws of any third country." *Id.* § 1603(b). The issue in this case is whether Powerex is an "organ" of British Columbia, which is a "political subdivision" of Canada, a "foreign state." *Id.* § 1603(b)(2).

2. This Court has ordered the parties also to address the applicability of 28 U.S.C. § 1447(d), which states in relevant part that an "order remanding a case to the State court from which it is removed is not reviewable on appeal or otherwise." Section 1447(d)'s bar of appellate review applies only to cases remanded under § 1447(c), which authorizes remand when, at the time of removal, there is a defect in removal procedure or lack of subject-matter jurisdiction. *See Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995).

Procedural History

1. This appeal arises out of consolidated actions originally filed in California state court by a class of plaintiffs (respondents here) against a number of defendants (also respondents here), including Reliant Energy Services, Inc. and Duke Energy Trading and Marketing, LLC. Reliant and Duke sold power in the California wholesale electricity markets. The proposed plaintiff class comprises retail purchasers of electricity in California. The plaintiffs alleged that the defendants had violated California statutes prohibiting anticompetitive conduct and unfair trade practices by acting in concert to withhold supply, create artificial shortages, and manipulate prices in California's wholesale electricity markets. *See* Pet. App. 7a. The plaintiffs did not name Powerex as a defendant.

Reliant filed a cross-complaint against Powerex, BC Hydro, other alleged market participants, and two federal agencies, BPA and the Western Area Power Administration ("WAPA"). Duke also filed a cross-complaint against

Powerex, BPA, WAPA, and several other entities, but not BC Hydro. Reliant and Duke alleged that, if they were liable, then the cross-defendants were liable as well because the cross-defendants also sold power in California's wholesale electricity markets.

Powerex and BC Hydro removed the action to federal district court as foreign states under 28 U.S.C. § 1441(d). BPA and WAPA also removed the case as federal "officer[s]" or "agenc[ies]" under 28 U.S.C. § 1442(a)(1). BC Hydro further contended that it was immune from suit under the FSIA, *see* 28 U.S.C. § 1604, and the federal agencies similarly asserted that federal sovereign immunity barred claims against them.[18] The plaintiffs moved to remand. *See* Pet. App. 7a-8a.

2. At the outset, the district court made clear that the case was "properly removed" to federal court. Pet. App. 20a. The district court also agreed with BC Hydro, BPA, and WAPA that sovereign immunity barred the claims against them. *See id.* at 21a-33a, 38a-44a.

The court concluded, however, that Powerex was not an agency or instrumentality of a foreign state under the FSIA, 28 U.S.C. § 1603(b). First, the court held that Powerex was not an "organ" of British Columbia, *id.* § 1603(b)(2), because Powerex does not exercise regulatory authority; it is not immune from suit; its directors are not directly appointed by the government and its employees are not civil servants; and (in the court's view) the Province does not exercise sufficient oversight of Powerex. *See* Pet. App. 34a-36a. Second, the court did not accept Powerex's contention that, because the Province owns all of Powerex's shares through BC Hydro, which is the Province's agent by statute, Powerex is an entity "a majority of whose shares or other ownership interest is owned by a"

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[18] Because the allegations in this case arise from a "commercial activity carried on in the United States" by Powerex, 28 U.S.C. § 1605(a)(2), Powerex did not claim immunity from suit under the FSIA.

political subdivision of a foreign state under § 1603(b)(2). The court reasoned that the Province's ownership of Powerex was insufficiently direct to satisfy the statute. *See id.* at 36a-38a.

Having resolved BC Hydro's and the federal agencies' claims of immunity and Powerex's claim of foreign-state status, the district court remanded the entire action to state court, without elaboration. *See id.* at 44a. It did so without first dismissing the claims against BC Hydro, BPA, and WAPA, even though it had held that those entities were immune from suit. Duke, Reliant, and Powerex sought a stay of the remand order, and BC Hydro and the federal agencies sought clarification that the court had in fact dismissed, not remanded, the claims against them. The district court denied those motions. Even though BC Hydro's and the federal agencies' rights to remove the case were undisputed and had been accepted by the court, the court stated that it lacked subject-matter jurisdiction over the entire action and therefore could neither grant a stay nor dismiss any claims. *See* JA 281-89.

3. Reliant, Duke, Powerex, BPA, and WAPA appealed. Powerex contested the holding that it was not an agency or instrumentality of British Columbia. Reliant and Duke challenged the district court's conclusion that BC Hydro and the federal agencies were immune from suit. And BPA and WAPA sought review of the district court's decision to remand, rather than dismiss, the claims against them.

At the outset, the court of appeals rejected the plaintiffs' contention that § 1447(d) precluded appellate review of the district court's remand order. The court noted that "the district court had jurisdiction over this case because BPA, WAPA, and BC Hydro properly removed the case from state court" and that "[s]uch a removal removes the *entire* case." Pet. App. 10a. Recognizing that § 1447(d) applies only to cases remanded for a defect in removal procedure or lack of subject-matter jurisdiction and that neither ground was present here, the Ninth Circuit held

that § 1447(d) did not bar review of the district court's rulings. *See id.*

The court of appeals then dispatched Duke's and Reliant's challenges to the district court's holdings on the immunity of BC Hydro and the federal agencies. *See id.* at 11a-14a. The Ninth Circuit also held that the cross-claims against the immune federal agencies should have been dismissed, and it therefore vacated the portion of the district court's order remanding the claims against those federal entities. *See id.* at 16a-17a.[19]

Turning to Powerex's appeal, the court initially explained that the relevant inquiry under the FSIA's "organ" prong is whether the entity engages in a public activity on behalf of a foreign government. *See id.* at 15a. And the court acknowledged the existence of record evidence that Powerex performs a public function on behalf of British Columbia. *See id.* at 15a-16a. But the court focused on a handful of facts that it viewed as undermining Powerex's claim – namely, that Powerex is "not run by government appointees"; is "not staffed with civil servants"; is (in the court's view) "not wholly owned by the government"; and does "not exercise any regulatory authority." *Id.* The court then explained that evidence of a public purpose did not suffice for organ status because "[Powerex's] high degree of independence from the government of British Columbia, combined with its lack of financial support from the government and its lack of special privileges or obligations under Canadian law[,] *dictate* our holding that Power[e]x is not an organ of British Columbia." *Id.* at 16a (emphasis added).

As to the FSIA's "ownership" prong, the court rejected Powerex's contention that the Province directly owns Powerex through BC Hydro as the Province's statutory agent. The court read this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), as foreclosing that contention because, regardless of any agency relationship,

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[19] BPA and WAPA have subsequently been dismissed from the case.

"unless the foreign government itself actually owns the shares, the entity does not meet the definition of a foreign state." Pet. App. 16a (citing 538 U.S. at 474-76).[20]

SUMMARY OF ARGUMENT

I. Congress passed the FSIA to provide "broad jurisdiction in the Federal courts" over cases involving foreign states and their agencies and instrumentalities. H.R. Rep. No. 94-1487, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604; S. Rep. No. 94-1310, at 12 (1976). Its aim was to mitigate the potential harm that suits against foreign governmental entities could cause to the United States' foreign relations. To that end, the Act permits a foreign entity to remove a suit to federal court when the entity is an "organ" of a foreign state or a foreign state's political subdivision. *See* 28 U.S.C. §§ 1441(d), 1603(a)-(b).

The FSIA's text, structure, and history demonstrate Congress's understanding that an organ entitled to a federal forum under the FSIA would always be separate from the government and would often be engaged in commercial activity. And this Court recognized as much in *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), when it described a "typical government instrumentality" as a "distinct economic enterprise." *Id.* at 624. With the exception of the Ninth Circuit in this case, lower courts have properly recognized that, in deciding whether an entity is an organ of a foreign government, a court should take into account a wide range of factors to determine whether the entity serves a public purpose.

Under the proper, fact-sensitive analysis, Powerex is an organ of British Columbia. The Province created Powerex to export its surplus hydropower. Today, Powerex performs additional public functions. It markets power received from the United States under the Columbia

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[20] On remand in state court, the claims against BC Hydro were dismissed.

River Treaty with the goal of maximizing the value of that public resource to the Province, and it fulfills Provincial responsibilities under international agreements relating to the Skagit River Treaty. Income from Powerex's activities benefits only the public treasury and the customers of the Province's public electricity utility, BC Hydro. Further, Provincial law imposes obligations on and provides benefits to Powerex unlike those incurred or received by private businesses.

In refusing to recognize Powerex's status as an organ of British Columbia, the Ninth Circuit failed to appreciate the significant public activities performed by Powerex. Instead, the court found dispositive several factors that conflict with the FSIA's text and structure, as well as common sense. The Ninth Circuit's misunderstanding of the basic principles of the FSIA's organ-status inquiry undermines the Act's goal of promoting international comity and threatens a bilateral trading relationship involving billions of dollars worth of electricity.

II. The court of appeals correctly concluded that it had appellate jurisdiction, notwithstanding 28 U.S.C. § 1447(d). Section 1447(d) applies only when the order of remand was authorized by § 1447(c). *See Thermtron*, 423 U.S. at 346. Section 1447(c), in turn, authorizes district courts to remand cases when there is a defect either in removal procedure or subject-matter jurisdiction at the time of removal. Here, the district court correctly concluded that the entire action was "properly removed." Pet. App. 20a. Therefore, the remand order could not have been authorized under § 1447(c), and § 1447(d) does not bar appellate review. In any event, Congress did not intend for § 1447(d) to foreclose appellate review of erroneous decisions denying a foreign governmental entity's rights under the FSIA.

ARGUMENT

I. POWEREX IS AN "ORGAN" OF BRITISH COLUMBIA

A. Congress Intended The Term "Organ" To Describe A Wide Variety Of Governmental Entities

In enacting the FSIA, Congress intended "to channel cases against foreign sovereigns away from the state courts and into federal courts." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983). The FSIA provides that "[a]ny civil action brought in a State court against a foreign state as defined in [the FSIA] may be removed by the foreign state to [federal] district court," where the case is tried without a jury. 28 U.S.C. § 1441(d). That "clear authority to remove" is a critical congressional guarantee, "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area." H.R. Rep. No. 94-1487, at 32; S. Rep. No. 94-1310, at 32 (same). The complementary right to a nonjury trial furthers Congress's desire for uniform adjudication of actions involving foreign states. *See* H.R. Rep. No. 94-1487, at 13 ("Actions tried by a court without jury will tend to promote a uniformity in decision where foreign governments are involved."); S. Rep. No. 94-1310, at 12 (same). Congress viewed the "uniformity in decision" provided by federal bench trials as "desirable" because "a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." H.R. Rep. No. 94-1487, at 13; S. Rep. No. 94-1310, at 12 (same).

The FSIA defines a "foreign state," which is entitled to remove to federal court under § 1441(d), broadly to include "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). The phrase "agency or instrumentality of a foreign state" includes any entity that "is an organ of a foreign state or political subdivision thereof." *Id.* § 1603(b). The FSIA does not define the term "organ." But the Act's text and structure demonstrate

that Congress intended that term to describe a variety of commercial entities and governmental corporations, and the federal courts largely have adhered to that intent.

1. The Act's language provides that an agency or instrumentality can be either an organ or an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b)(2). Under this Court's decision in *Dole Food*, an entity does not satisfy the latter "ownership" prong unless the foreign state or political subdivision directly owns more than 50 percent of the entity's shares or other ownership interest. *See* 538 U.S. at 477. Thus, for the term "organ" to have meaning, it must describe entities in which the foreign government does *not* directly own a majority of the shares or other ownership interest. That provision offers powerful evidence that Congress intended the term "organ" to encompass a wide variety of foreign governmental entities with varying ownership structures.

The FSIA's structure also makes clear that an entity's commercial character does not count against the entity in assessing organ status. The Act codified "the restrictive theory of sovereign immunity," under which foreign sovereigns are not immune from suits arising from their commercial acts. *See Verlinden*, 461 U.S. at 487-88; 28 U.S.C. § 1605(a)(2). But the Act's commercial-activity exception applies only to claims of immunity.[21] The FSIA grants entities that satisfy § 1603(a)'s broad definition of a "foreign state" other jurisdictional and procedural protections – including the right to a bench trial in federal court – regardless of whether the suit arises from a commercial activity. *See* 28 U.S.C. §§ 1391(f), 1441(d), 1606, 1608-1609, 1611; *Dole Food*, 538 U.S. at 484 (Breyer, J., concurring in

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[21] *See* 28 U.S.C. § 1605(a)(2) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state").

part and dissenting in part). That structure demonstrates that Congress intended foreign governmental corporations to be considered organs of foreign states regardless of their commercial character. And the House and Senate reports confirm that conclusion, explaining that a "variety" of commercial entities could qualify for the Act's protections, such as "a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, [or] an export association." H.R. Rep. No. 94-1487, at 15-16; S. Rep. No. 94-1310, at 15 (same).[22]

Further, "organ" was not the only term in the FSIA that Congress left for judicial elaboration. The FSIA defines a "commercial activity" – the practice of which can defeat a foreign entity's claim of immunity – only by "reference to the nature of the course of conduct or particular transaction or act" that is alleged to constitute commercial activity. 28 U.S.C. § 1603(d). That inexact standard reflects the view that "[i]t has seemed unwise to attempt an excessively precise definition of [the phrase "commercial activity"], even if that were practicable." H.R. Rep. No. 94-1487, at 16; S. Rep. No. 94-1310, at 16 (same). Instead, Congress decided to grant the courts "a great deal of latitude in determining what is a 'commercial activity.'" H.R. Rep. No. 94-1487, at 16; S. Rep. No. 94-1310, at 16 (same). The omission of a precise definition of the term "organ" thus similarly indicates Congress's intent that courts take a flexible approach in evaluating whether an entity is a foreign government's organ.

2. In accordance with the FSIA's text and structure, lower federal courts (other than the court below) have

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[22] Moreover, the legislative history shows that Congress understood that those types of entities generally would not be afforded immunity – although they would receive the other benefits of their governmental status. *See* H.R. Rep. No. 94-1487, at 16 (commercial activity "includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation"); S. Rep. No. 94-1310, at 15 (same).

interpreted the term "organ" with reference to a wide range of factors.[23] In general, courts have considered the touchstone of organ status to be whether the entity

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[23] *See Board of Regents v. Nippon Tel. & Tel. Corp.*, No. 05-51432, 2007 WL 273957, at *4 (5th Cir. Feb. 1, 2007); *Peninsula Asset Mgmt. (Cayman) Ltd. v. Hankook Tire Co.*, Nos. 05-6886-CV(L) & 06-0624-CV(XAP), 2007 WL 241294, at *2-*3 (2d Cir. Jan. 30, 2007); *Filler v. Hanvitt Bank*, 378 F.3d 213, 217 (2d Cir.), *cert. denied*, 543 U.S. 1022 (2004); *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 209 (3d Cir. 2003); *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 640 (9th Cir. 2003); *EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co.*, 257 F.3d 992, 997 (9th Cir. 2001); *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001), *aff'd in part, dismissed in part*, 538 U.S. 468 (2003); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-47 (5th Cir. 2000); *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.3d 1078, 1084 (9th Cir. 1999), *withdrawn by* 237 F.3d 1007 (9th Cir. 2001); *Corporacion Mexicana de Servicios Maritimos, S.A. v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996); *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1460-61 (9th Cir. 1995); *S&S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 414-15 (2d Cir. 1983); *Murphy v. Korea Asset Mgmt. Corp.*, 421 F. Supp. 2d 627, 639-46 (S.D.N.Y. 2005), *aff'd*, 190 F. App'x 43 (2d Cir. 2006), *petition for cert. pending*, No. 06-728 (U.S. filed Nov. 22, 2006); *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 552-53 (S.D.N.Y. 2005); *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 790-91 (S.D.N.Y. 2005); *RSM Prod. Corp. v. Petroleos de Venezuela Societa Anonima*, 338 F. Supp. 2d 1208, 1215 (D. Colo. 2004); *Filler v. Hanvit Bank*, 247 F. Supp. 2d 425, 428 (S.D.N.Y. 2003), *vacated in part on other grounds*, Nos. 01 Civ. 9510 *et al.*, 2003 WL 21729978 (S.D.N.Y. July 25, 2003), *aff'd*, 378 F.3d 213 (2d Cir.), *cert. denied*, 543 U.S. 1022 (2004); *Jeong v. Onada Cement Co.*, No. CV 99-11092 GHK, 2000 WL 33954824, at *8-*10 (C.D. Cal. May 17, 2000); *United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, No. 97 Civ. 6124(JGK), 1999 WL 307666, at *5 (S.D.N.Y. May 17, 1999), *aff'd*, 199 F.3d 94 (2d Cir. 1999); *Glencore, Ltd. v. Chase Manhattan Bank, N.A.*, No. 92 Civ. 6214(JFK), 1998 WL 74294, at *3 (S.D.N.Y. Feb. 20, 1998); *Southern Ocean Seafood Co. v. Holt Cargo Sys., Inc.*, No. Civ. A. 96-5217, 1997 WL 539763, at *4-*5 (E.D. Pa. Aug. 11, 1997); *Supra Med. Corp. v. McGonigle*, 955 F. Supp. 374, 378-79 (E.D. Pa. 1997); *Intercontinental Dictionary Series v. de Gruyter*, 822 F. Supp. 662, 672-73 (C.D. Cal. 1993); *Sudano v. Federal Airports Corp.*, 699 F. Supp. 824, 826 n.3 (D. Haw. 1988); *Rios v. Marshall*, 530 F. Supp. 351, 371 (S.D.N.Y. 1981); *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 852-54 (S.D.N.Y. 1978); *Edlow Int'l Co. v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827, 832 (D.D.C. 1977).

engages in activity serving "a national interest" or "public purpose" and does so on behalf of a foreign government. *E.g.*, *USX*, 345 F.3d at 209. In applying that standard, courts typically examine multiple complementary factors, including the manner of the entity's creation, its purpose, government supervision of the entity, government financial support, the entity's employment practices, and the entity's obligations and privileges under the foreign law. *See id.* at 206, 209; *see also Filler*, 378 F.3d at 217; *Kelly*, 213 F.3d at 846-47. Mindful, however, that Congress intended a flexible approach to organ status, courts do "*not* apply [those considerations] mechanically or require that all . . . support an organ-determination." *Kelly*, 213 F.3d at 847; *accord USX*, 345 F.3d at 207, 209 (noting "congressional goals of promoting uniformity of decision and avoiding impairing foreign relations," and concluding that "no one [factor] is determinative").

The factors that lower courts have considered in applying the FSIA's organ prong comport with the "common features" of a "typical government instrumentality" identified by this Court in *Bancec*, 462 U.S. at 624. There, the Court explained that a "typical government instrumentality" – "if one can be said to exist" – often exhibits the following features: it "is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law"; it "is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued"; "[e]xcept for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances"; "[t]he instrumentality is run as a distinct economic enterprise"; and "often it is not subject to the same budgetary and personnel requirements with which government agencies must comply." *Id.* Although the Court was not interpreting the FSIA, its description of a "typical government instrumentality" is instructive for interpreting the FSIA, in which the contours

of a foreign government instrumentality are also the subject of inquiry.

B. Powerex Performs Public Activities On Behalf Of The Province Of British Columbia And Canada

When applying the FSIA's organ prong, courts should consider all relevant evidence in determining whether the foreign entity performs public activities on behalf of the foreign government. Under that approach, Powerex unquestionably is an organ of British Columbia.[24]

1. The circumstances of Powerex's creation, which the Ninth Circuit completely ignored, demonstrate Powerex's governmental origin. The Provincial government directed its statutory agent, BC Hydro (a Crown Corporation), to create Powerex as the corporation's wholly owned subsidiary. The Province's purpose in ordering the creation of Powerex was to establish an exclusive export agency to market Provincial hydropower in a way that maximizes the benefits to British Columbia. *See supra* pp. 9-10.[25]

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[24] While "[i]t is not customary for this Court to review the sufficiency of the evidence," it will do so when, as here, "the issue is properly before [it] and the benefits of providing guidance concerning the proper application of a legal standard and avoiding the systemic costs associated with further proceedings justify the required expenditure of judicial resources." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993) (collecting cases). In FSIA cases, this Court has applied the law to the facts of the case when the issue was properly before the Court. *See Dole Food*, 538 U.S. at 474-77 (evaluating whether the Dead Sea Companies "were . . . instrumentalities of Israel under the FSIA at any time"); *Saudi Arabia v. Nelson*, 507 U.S. 349, 356-63 (1993) (evaluating whether the underlying FSIA action was "based on" a commercial activity); *Amerada Hess*, 488 U.S. at 439-43 (evaluating "whether any of the exceptions enumerated in the [FSIA] apply here").

[25] Although British Columbia did not create Powerex through "an enabling statute," as this Court suggested in *Bancec* was "typical," the *Bancec* Court recognized that the features it listed would not be found in every government instrumentality, for it noted uncertainty about whether a "typical" government instrumentality "can be said to exist." 462 U.S. at 624.

2. Powerex's public purposes have expanded. Since 1997, Powerex has participated in wholesale electricity markets within the United States, thereby increasing its ability to purchase power for use in the Province. Further, the Province has entrusted Powerex to market a significant public resource – Canada's right to receive power from the United States under the Columbia River Treaty. And Powerex has participated in negotiating international agreements and performed international obligations for the benefit of British Columbia under the British Columbia–Seattle Agreement and the Skagit River Treaty.[26] *See supra* pp. 10-12.

In addition to those public responsibilities, in the early 1990s, the Province instructed Powerex to explore prospects for creating an efficient Provincial market for energy trading. *See* Pet. App. 54a (Peterson Decl.). In 1997, British Columbia enacted legislation empowering the Provincial government to promote job creation by requiring Powerex (as a subsidiary of BC Hydro) to provide subsidized energy to domestic businesses. *See* Power for Jobs Development Act, S.B.C., ch. 51, §§ 2-3, 6 (1997) (Pet. App. 193a-195a); Pet. App. 55a-56a (Peterson Decl.).

3. Critically, Powerex's revenue does not result in *any* private profit because neither BC Hydro nor Powerex has any private shareholders. Only the Province (and BC Hydro's domestic electricity customers) ultimately benefit from any income generated by Powerex's operations. Under a formula set by Provincial law, BC Hydro annually pays directly to the Province up to 85 percent of its consolidated net income (which includes all of Powerex's income). *See* JA 215 (Lambert Decl.).[27] In addition, the

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[26] *Cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-19 (1936) (negotiating treaties is a "necessary concomitant[] of nationality").

[27] *See* Hydro Act § 35 (authorizing the Lieutenant Governor in Council to direct BC Hydro to pay amounts to the Provincial government) (Pet. App. 187a); Heritage Special Directive No. HC1 to the British Columbia Hydro and Power Authority, Order in Council No. 1125

British Columbia Utilities Commission is required to consider Powerex's projected income in setting BC Hydro's utility rates. *See* JA 215 (Lambert Decl.), 238 (Peterson Dep.).[28] Thus, Powerex's activities result in more affordable electricity for the citizens of British Columbia.

Powerex's earnings are consolidated with those of BC Hydro for purposes of BC Hydro's statutorily required financial statements. *See* JA 215 (Lambert Decl.), 238 (Peterson Dep.); *BC Hydro's Annual Report 2006*, at 83, *available at* http://www.bchydro.com/rx_files/info/info

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(Nov. 27, 2003) (Add. 66). Special Directive No. 4 to the British Columbia Hydro and Power Authority, Order in Council No. 494 (Mar. 30, 2000), which was in effect at the time of removal in this case, was repealed by Order in Council No. 1125 on November 27, 2003. The same Order made effective Heritage Special Directive No. HC1. Special Directive No. 4 required BC Hydro to make an annual payment to the Province according to a specified formula. *See* Special Directive No. 4 §§ 3-8 (Pet. App. 203a-204a). Similarly, Heritage Special Directive No. HC1 provides that the consolidated net income of BC Hydro and its subsidiaries (such as Powerex) are used to determine BC Hydro's "distributable surplus," up to 85 percent of which must be "pa[id] to the government, for deposit into the consolidated revenue fund." §§ 1, 3 (Add. 65, 66).

[28] *See* Heritage Special Direction No. HC2 to the British Columbia Utilities Commission, Order in Council No. 1123, §§ 1, 6 (Nov. 27, 2003) (Add. 53-54, 56). Special Direction No. 8 to the British Columbia Utilities Commission, B.C. Reg. 71/98, amended by B.C. Regs. 72/98, 73/98, and 119/2000, §§ 3-5 (*see* Pet. App. 205a-214a), which was in effect at the time of removal, was repealed by Order in Council No. 1107 on November 27, 2003. It was replaced by Heritage Special Direction No. HC2, which was made effective by Order in Council No. 1123 on the same date. Like Special Direction No. 8, Heritage Special Direction No. HC2 provides that, when the Commission sets BC Hydro's rates, it must allow BC Hydro "an annual rate of return on equity calculated using forecast consolidated operating income" that is, in turn, "calculated on the basis" of Powerex's anticipated net income. §§ 1, 6 (Add. 54, 56). *See generally* JA 206 (Report on Export Trade) ("Since consolidated net income is used for rate setting purposes, the optimization of [Powerex's] electricity trade income benefits domestic ratepayers by reducing the portion of [BC Hydro's] revenue requirement that must be collected through domestic rates.").

46749.pdf.[29] When the two company's financial statements are consolidated, revenues and expenses attributable to transactions between the two firms are eliminated. *See* JA 220 (Lambert Dep.); *BC Hydro's Annual Report 2006*, at 83. Further, under the British Columbia Budget Transparency and Accountability Act, S.B.C., ch. 23 (2000) ("BTAA"), BC Hydro's consolidated financial information is reflected in Provincial budget documents. *See* BTAA §§ 1, 5-6, 9-10 (Add. 13-21).[30]

4. The Province supervises Powerex's operations in a variety of ways. *First*, Provincially appointed BC Hydro directors control Powerex's board of directors. The Lieutenant Governor in Council appoints BC Hydro's board of

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[29] The British Columbia Financial Information Act and accompanying regulation specify detailed information that BC Hydro must periodically prepare and make available to the Province and the public. *See* Financial Information Act, R.S.B.C., ch. 140 (1996); Financial Information Regulation, B.C. Reg. 371/93, § 1 (1993) (Add. 28-29). That Act applies to corporations "the borrowings of which may be guaranteed by the government[] under the authority of" several listed statutes, including the Hydro Act. Financial Information Act § 1 (Add. 27). Under the Financial Information Regulation, the financial statements must be prepared "on a consolidated basis where a parent and subsidiary corporate relationship exists." Financial Information Regulation, Sched. 1, § 1(3)(a) (Add. 28). *See, e.g.*, BC Hydro, *Financial Information Act Return* (2006), *available at* http://www.bchydro.com/rx_files/policies/policies48313.pdf.

[30] *See also, e.g.*, British Columbia Ministry of Finance, *Budget and Fiscal Plan 2006/07 – 2008/09*, at 31-33, 35-36 (Feb. 21, 2006), *available at* http://www.bcbudget.gov.bc.ca/2006/bfp/BudgetandFiscalPlan_06.pdf. The Budget Transparency and Accountability Act applies to "government organization[s]," which means "a corporation or other organization that is within the government reporting entity." BTAA § 1 (Add. 13). The phrase "government reporting entity" includes "government corporations." *Id.* (Add. 14). The Act does not define "government corporation[]," but it states in § 1(2) that, "to the extent that this Act or regulations under this Act do not otherwise define a word or expression used in this Act, the definitions in the *Financial Administration Act* apply." *Id.* § 1.2 (Add. 15). Thus, because Powerex is a "government corporation" under the FAA, *see infra* note 31, it is a "government organization" for purposes of the Budget Transparency and Accountability Act.

directors. *See* Pet. App. 58a-59a (Peterson Decl.). BC Hydro's board, in turn, appoints Powerex's board of directors. *See id.* A majority of Powerex's board is composed of Provincially appointed BC Hydro directors, and the BC Hydro board advises the British Columbia Premier's Office of the identity of outside directors in advance of appointing them. *See id.*; JA 233-35 (Peterson Dep.); *see also* JA 248 (Peterson Dep.) (noting that the Premier's Office had disapproved a potential Powerex outside director).

At the time of removal in this case, the same person chaired the boards of both Powerex and BC Hydro; another individual served as Chief Financial Officer of both Powerex and BC Hydro; and the corporate secretary and assistant secretary were the same for both entities. *See* JA 226 (Lambert Dep.), 233, 234, 235 (Peterson Dep.). In addition, BC Hydro acts as Powerex's treasurer and payroll agent, *see* Pet. App. 59a (Peterson Decl.); JA 214 (Lambert Decl.), 230 (Peterson Dep.), and the communications and government-relations functions are centralized for the two firms. *See* JA 235 (Peterson Dep.).

Second, the record reflects the control of Powerex's financial exposure by a risk-management committee composed of officers of BC Hydro and Powerex that reports periodically to British Columbia's Ministry of Finance. *See* Pet. App. 28a; *id.* at 59a (Peterson Decl.); JA 219-20 (Lambert Dep.), 240-41 (Peterson Dep.); *see also* JA 212-13 (Report on Export Trade). Limiting Powerex's financial exposure is important to the Province because Powerex's trading activity can have political repercussions. For example, Powerex's former Chief Executive Officer testified that the problems Powerex has encountered in obtaining payment for power sold in California during 2000 and 2001 created "a political firestorm . . . in British Columbia." JA 232 (Peterson Dep.). California officials had "importuned" officials of Powerex and BC Hydro to provide the State with electricity, and (with the Province's approval) Powerex fulfilled those requests, even though

there was an energy shortage in British Columbia at the time. JA 232-33, 243-45 (Peterson Dep.). As a result, Powerex's CEO explained, "Provincial government representatives, because this was a popular story in the press, were continually questioned by their constituents as to why an agency of the Crown [*i.e.*, Powerex] was continuing to sell power into California." JA 233 (Peterson Dep.).

Third, unlike private corporations, Powerex is subject to extensive regulation and oversight of numerous aspects of its financial operations. Powerex is a "government body" subject to British Columbia's Financial Administration Act, R.S.B.C., ch. 138 (1996) ("FAA"), which is the Provincial government's fundamental statutory tool of fiscal control.[31] Under the FAA, the Provincial Treasury Board can regulate Powerex's capital expenditures; the Provincial Comptroller General can review Powerex's financial and accounting operations; and the Provincial government can regulate the terms, conditions, and circumstances under which Powerex can enter banking arrangements, lend money, provide financial guarantees or indemnities, borrow money, and acquire property. *See* FAA §§ 4.1, 8(2)(c)(i), 75 (Add. 34-35, 36, 40-41). The FAA also precludes government bodies like Powerex from transacting in commodity derivatives unless authorized to do so by the Provincial Treasury Board. *See id.* § 79.3 (Add. 42). (The Treasury Board has specifically authorized Powerex to engage in those transactions. *See* Commodity Derivatives by Government Bodies Regulation, B.C. Reg.

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[31] The FAA applies to a "government body," a "government corporation," and a "public body." FAA § 1 (Add. 31, 33). The Act defines a "government body" as, among other things, a "government corporation," and it defines both a "government corporation" and a "public body" as, among other things, a corporation in which the government owns "directly or indirectly" more than 50 percent of the shares. *Id.* Because BC Hydro, which is wholly owned by the Province, owns all the shares of Powerex as an agent of the Province, British Columbia owns Powerex "directly or indirectly," and Powerex is therefore a "government body," a "government corporation," and a "public body" under the FAA.

407/2000 (Add. 43).) Further, the Budget Transparency and Accountability Act imposes additional financial-disclosure obligations on Powerex. *See* BTAA §§ 13, 16, 20 (Add. 21-26). Powerex also conforms to Provincial constraints on employee compensation – preventing it from paying salaries equal to those paid by private energy companies. *See* JA 241-42 (Peterson Dep.). And, because Powerex is defined as a "government corporation" under the FAA, *see supra* note 31, its employees are "public office holders" under the Lobbyists Registration Act, S.B.C., ch. 42, § 1 (2001) (Add. 50).

5. Powerex also receives significant benefits under Canadian and Provincial law. As a wholly owned subsidiary of a Crown Corporation, Powerex – unlike private corporations – does not pay Canadian federal or Provincial income tax. *See* Pet. App. 58a (Peterson Decl.).[32] Powerex also receives financial guarantees from BC Hydro to facilitate its export trade, and the Province approves those guarantees. *See id.* at 59a; JA 215 (Lambert Decl.), 223-25, 228 (Lambert Dep.), 239-40 (Peterson Dep.). BC Hydro borrowings and other fiscal arrangements are provided through, and therefore supported by, the Provincial government, resulting in BC Hydro having the same credit rating as the Province. *See* Pet. App. 59a (Peterson Decl.); JA 215 (Lambert Decl.). Powerex does not have its own credit rating. *See* JA 240 (Peterson Dep.).

In addition, under the FAA, Provincial officials can make loans to Powerex on behalf of the government and

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[32] The Canadian Constitution Act of 1867 provides that "[n]o lands or property belonging to Canada or any Province shall be liable to Taxation." Constitution Act, 1867 (The British North America Act), 30 & 31 Vict., ch. 3 (U.K.), *reprinted in* R.S.C., No. 5, § 125 (App. II 1985) (Pet. App. 162a). Accordingly, the Canadian Income Tax Act exempts from taxation wholly owned subsidiaries of Crown Corporations, such as Powerex. *See* Income Tax Act, R.S.C., ch. 1 (5th Supp.), § 149(1)(d), (d.2) (1985) (Add. 45). Similarly, the British Columbia Income Tax Act exempts from taxation entities exempt under § 149(1) of the Canadian Income Tax Act. *See* Income Tax Act, R.S.B.C., ch. 215, § 27 (1996) (Add. 47).

assume Powerex's debt obligations. *See* FAA §§ 53, 56.3(1) (Add. 39-40). The FAA also provides that Powerex is eligible for governmental insurance and risk-management services. *See id.* § 30 (Add. 37). Further, under the Land Act, the Lieutenant Governor in Council can reserve land owned by the government for Powerex's use. *See* R.S.B.C., ch. 245, § 15(2)-(3) (1996) (Add. 48).[33] Finally, Powerex's employees participate in BC Hydro's retirement plan. *See* JA 247-48 (Peterson Dep.).

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In sum, each of the factors that courts typically consider (*see supra* p. 24) supports the conclusion that Powerex is an organ under the FSIA: Powerex was created at the Province's direction to serve a public purpose; it continues to perform public functions; the Province supervises Powerex like a governmental entity (including its employment practices); the Province provides Powerex financial support independently and through BC Hydro; and Powerex enjoys special privileges, such as immunity from taxation. Thus, as the federal government of Canada and the Province of British Columbia have attested in briefs in this Court, Powerex is an organ of British Columbia.[34]

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[33] Section 15(1) of the Land Act benefits "government bod[ies]," Add. 48, the definition of which references a portion of the FAA's definition of government corporations that applies to Powerex. *See supra* note 31.

[34] Brief of the Province of British Columbia as *Amicus Curiae* in Support of Petitioner at 6 (filed Aug. 17, 2005); Brief of the Government of Canada as *Amicus Curiae* in Support of Petitioner at 3, 11 (filed Aug. 17, 2005). Under pre-FSIA law, courts gave great weight to a foreign government's views of the sovereign status of one of its governmental corporations or instrumentalities. *See Restatement (Second) of Foreign Relations Law of the United States* § 66 reporters' note 2 (1965) ("[G]reat weight must be given to the fact that the foreign state considers [a] corporation to be performing the functions of a governmental agency."). Courts should continue to give significant weight to the foreign government's understanding of the relationship between itself and a corporation that it created, particularly where, as here, the

C. The Ninth Circuit's Narrow Interpretation Of The Term "Organ" Is Erroneous

Instead of applying the flexible, fact-sensitive approach to the organ-status question that prevails in the Second, Third, and Fifth Circuits, the Ninth Circuit undertook a mechanical and circumscribed inquiry. In failing to consider all relevant factors, the court of appeals deviated from Congress's intent to afford the FSIA's protections to a wide variety of governmental entities. In addition, the court of appeals relied heavily on several circumstances that cannot be reconciled with the logic and structure of the FSIA.

1. As an initial matter, the Ninth Circuit erred fundamentally in disregarding evidence that Powerex fulfills a public purpose on behalf of the Province. The court recognized that "Power[e]x serves a public purpose in maximizing the value of the Province's surplus hydropower." Pet. App. 15a. But the court dismissed that fact and instead held that Powerex's supposed "high degree of independence from the government of British Columbia," "lack of financial support from the government," and "lack of special privileges or obligations under Canadian law *dictate* [the] holding that Power[e]x is not an organ of British Columbia." *Id.* at 16a (emphasis added). Thus, in addition to ignoring dispositive evidence of public purpose, the court below failed to consider critical factors such as the circumstances of Powerex's creation, the numerous Provincial laws that regulate Powerex as a governmental entity, and the extraordinary benefits Powerex enjoys – such as immunity from taxation.

2. Further, the characteristics selected by the Ninth Circuit as dispositive are contrary to the FSIA's structure and logic. The Ninth Circuit relied heavily on Powerex's lack of immunity from suit under its domestic law. *See* Pet. App. 15a-16a. But any FSIA agency or instrumental-

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corporation is not claiming immunity. *See S&S Mach.*, 706 F.2d at 415.

ity must be "a separate legal person, corporate or otherwise," 28 U.S.C. § 1603(b)(1) – a phrase "intended to include a corporation . . . which, under the law of the foreign state where it was created, *can sue or be sued in its own name*, contract in its own name or hold property in its own name." H.R. Rep. No. 94-1487, at 15 (emphasis added); S. Rep. No. 94-1310, at 14 (same); *cf. Bancec*, 462 U.S. at 624-25 (government instrumentality "is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued"). Thus, Congress expected that an organ generally would be amenable to suit in its home country. Although a foreign government's decision to confer immunity from suit on an entity may be highly probative of that entity's organ status, lack of immunity under domestic law should be afforded little or no weight.[35]

The Ninth Circuit's undue focus on Powerex's supposedly high degree of independence from the Provincial government, *see* Pet. App. 16a, is similarly flawed because it ignores Congress's decision that any entity eligible to be an organ would be a "separate legal person" and thus have some significant level of independence from the government that created it. 28 U.S.C. § 1603(b)(1); *cf. Bancec*, 462 U.S. at 624 (the "distinctive features" of government instrumentalities permit them "a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies"). Moreover, the Ninth Circuit's reliance on the fact that Powerex's employees are not "civil servants," Pet. App. 15a, disregards this Court's recognition in *Bancec* that the government instrumentalities "often [are] not subject to the same . . . personnel requirements with which government agencies must comply." 462 U.S. at 624. In any event, the Ninth Circuit ignored the record evidence

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[35] A foreign entity's lack of immunity under its own law should carry even less weight in a case such as this one, where the foreign entity does not contend that it deserves immunity under United States law.

showing that Provincial political constraints affect Powerex's risk-management and compensation practices. *See supra* pp. 29-31.

The Ninth Circuit also misconstrued the Act in opining that Powerex should be denied organ status because it is "an independent commercial enterprise pursuing its own profits" and (allegedly) lacks financial support from the government. Pet. App. 15a-16a. Congress intended the phrase "agency or instrumentality of a foreign state" to include governmental corporations, regardless of whether those corporations perform commercial activities (and therefore cannot claim immunity from suit). *See* H.R. Rep. No. 94-1487, at 16 (including "a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, [and] a steel company" as examples of agencies or instrumentalities); S. Rep. No. 94-1310, at 15 (same). It is thus illogical to refuse to recognize the governmental status of a corporation simply because it generates sufficient revenue to sustain its operations without government subsidization. That is particularly true of Powerex, which derives significant revenue from marketing power received from the United States under the Columbia River Treaty – a pact that is the quintessence of a sovereign's functions. Indeed, as this Court recognized in *Bancec*, the typical government instrumentality "is primarily responsible for its own finances" and "is run as a distinct economic enterprise." 462 U.S. at 624.

The relevant fact, which the Ninth Circuit ignored, is who ultimately benefits from the entity's earnings. Here, the undisputed evidence shows that the Province and its citizens – not private shareholders – receive all of the benefits of Powerex's activities. In any event, the Ninth Circuit failed to recognize that British Columbia provides financial support to Powerex through, among other things, BC Hydro financial guarantees. *See supra* p. 31.

Finally, the Court below went astray in emphasizing that Powerex's shares are held by BC Hydro – rather than

the Province itself. *See* Pet. App. 15a-16a. Indirect or tiered ownership should be irrelevant to the organ-status inquiry because the FSIA's organ prong is relevant only when the foreign government does not directly own a majority of the entity's shares or other ownership interest. *See supra* p. 21; *Dole Food*, 538 U.S. at 477. It would be illogical, therefore, to count one strike against a foreign entity in applying the organ prong simply because the entity is not "directly" owned by the foreign government.[36]

D. Broad Interpretation Of The Foreign Sovereign Immunities Act's Protections Is Critically Important To United States Foreign Relations

1. Adopting the Ninth Circuit's parsimonious construction of the FSIA would have deleterious consequences for United States foreign relations and foreign trade. The Ninth Circuit's narrow interpretation of the FSIA's organ prong undoubtedly will result in more corporations created by foreign governments being forced to litigate in state court before juries and elected judges. That result conflicts with Congress's intent to provide "broad jurisdiction in the Federal courts," H.R. Rep. No. 94-1487, at 13, thereby assuring "uniformity in the treatment of foreign sovereigns and [removing] any local bias that might be present at a jury trial in a state court," *Davis v. McCourt*, 226 F.3d 506, 511 (6th Cir. 2000).[37] Relegating foreign governmental entities to state court risks exactly the "adverse foreign relations consequences"

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[36] In any event, British Columbia *does* directly own all of Powerex's shares, through its statutory agent, BC Hydro. *See supra* p. 10. The FSIA's ownership prong is thus satisfied in this case. The petition sought review of the Ninth Circuit's erroneous conclusion on the ownership issue, but this Court granted the petition limited to the organ issue.

[37] The possibility of local bias is no idle concern. In this case, for example, the federal judges of the Southern District of California recused themselves, necessitating the appointment of Judge Whaley from the Eastern District of Washington. *See* JA 93-95. The judges of the California Superior Court took no similar action, however.

that Congress sought to prevent in passing the Act. H.R. Rep. No. 94-1487, at 13; *see Republic of Mexico v. Hoffman*, 324 U.S. 30, 35-36 (1945) ("judicial action exercising or relinquishing jurisdiction over the [property] of a foreign government . . . may be regarded as . . . an affront to [that government's] dignity"). In addition, the possibility of being deprived of a uniform national forum for resolving disputes presents a serious deterrent to foreign governments' investment and participation in United States markets.[38]

The volume of commerce that could be adversely affected by affirming the decision below is staggering. For example, this case involves Canada, the United States' largest trading partner. The two nations "share one of the world's largest and most comprehensive trading relationships, which supports millions of jobs in each country."[39] In 2005, that bilateral trading relationship was worth $709.5 billion, with more than $1.9 billion worth of goods and services crossing the border daily.[40]

Further, Canada is the largest electricity supplier to the United States.[41] And the bulk of Canadian electricity exports are made by Provincial Crown Corporations (such as BC Hydro) or their marketing subsidiaries (such as Powerex). From 2000 through 2005, Powerex exported energy to the United States worth more than $5.5 billion

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[38] *See* Brief of the Province of British Columbia as *Amicus Curiae* in Support of Petitioner at 3 (filed Aug. 17, 2005) (Decision below "is a wholly unacceptable derogation of the respect sovereigns owe one another as well as an intolerable impediment to ordering the Province's commercial affairs. The increased vulnerability to state court litigation will have a chilling effect on the normally healthy cross-border trade relations between Canada and the United States.").

[39] Canadian Embassy, *The Canada-U.S. trade and investment partnership, available at* http://www.dfait-maeci.gc.ca/can-am/washington/trade_and_investment/trade_partnership-en.asp.

[40] *See id.*

[41] *See* Canadian Embassy, Electricity, *at* http://geo.international.gc.ca/can-am/main/right_nav/electricity-en.asp.

Canadian.[42] During those same years, four subsidiaries of other Canadian Crown Corporations exported to the United States energy worth approximately $9.5 billion Canadian.[43] Prospectively, Canada estimates future development of enough hydroelectricity to satisfy an additional six percent of United States demand.[44] Thus, an adverse ruling in this case would create a significant disincentive to subsidiaries of Canadian Crown Corporations to sell their electricity in circumstances that might subject them to suit in state courts.

2. Reversing the Ninth Circuit's decision is also critically important to avoid disrupting the growth of cross-border trade in North America under NAFTA.[45] NAFTA Article 1102(1) makes clear that the U.S. must guarantee Powerex "treatment no less favorable than it accords, in like circumstances," to domestic investors. NAFTA Art. 1102(1), 32 I.L.M. at 639 (Pet. App. 147a). This "broad

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[42] Canadian National Energy Board, Annual Report 2005 to Parliament at Appendix E6: Electricity Exports 2005 (Mar. 20, 2006); Canadian National Energy Board, Annual Report 2004 to Parliament at Appendix E6: Electricity Exports 2004 (Mar. 22, 2005); Canadian National Energy Board, Annual Report 2003 to Parliament at Appendix E6: Electricity Exports 2003 (Mar. 14, 2004); Canadian National Energy Board, Annual Report 2002 to Parliament at Appendix E6: Electricity Exports 2002 (Mar. 14, 2003); Canadian National Energy Board, Annual Report 2001 to Parliament at Appendix E6: Electricity Exports 2001 (Mar. 15, 2002); Canadian National Energy Board, Annual Report 2000 to Parliament at Appendix E6: Electricity Exports 2000 (Mar. 17, 2001). Those annual reports are available at http://www.neb-one.gc.ca/Publications/index_e.htm#AnnualReports.

[43] *See* the sources cited in note 42, *supra*. Those four Canadian sovereign corporations were Hydro-Quebec, Manitoba Hydro-Electric Board, New Brunswick Power Corp., and Ontario Power Generation.

[44] *See* Canadian Embassy, Electricity, *at* http://geo.international.gc.ca/can-am/main/right nav/electricity-en.asp.

[45] North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, done Dec. 17, 1992, 32 I.L.M. 289 ("NAFTA").

requirement" establishes that there "shall be no discrimination by a Party as between domestic and foreign investors." Daniel Q. Posin, *The Multi-Faceted Investment Arbitration Rules of NAFTA*, 13 World Arb. & Mediation Rep. 13, 13-14 (2002). By treating other comparable and functionally similar United States wholesale power suppliers such as BPA and WAPA as sovereign entities while denying Powerex's status as a foreign sovereign – even though BPA and Powerex alike perform governmental duties under the Columbia River Treaty – the decision below gives an unfair national benefit to a United States entity in discrimination against a Canadian entity.

Moreover, the Ninth Circuit applied a different standard for organ immunity in this case than it previously applied in a case involving a Mexican entity. *See Corporacion Mexicana*, 89 F.3d at 654-55 (applying a fact-sensitive approach in holding that a subsidiary of Mexico's government-owned petroleum monopoly is an organ of Mexico under the FSIA). The Ninth Circuit's decision thus failed to "accord to investors of [the Province] treatment no less favorable than that it accords, in like circumstances, to investors of any other" NAFTA member nation (such as Mexico). NAFTA Art. 1103(1), 32 I.L.M. at 639 (Pet. App. 148a). This Court should reverse that disparate treatment by recognizing Powerex's status as an organ of British Columbia under the FSIA.

II. THE COURT OF APPEALS HAD JURISDICTION TO REVIEW THE DISTRICT COURT'S REMAND ORDER

The court of appeals had jurisdiction to review the district court's remand order because 28 U.S.C. § 1291 granted jurisdiction and, for two independent reasons, § 1447(d) did not take it away. First, § 1447(d) bars only review of remand orders authorized under § 1447(c), and the district court's remand order was not authorized under that provision. Second, § 1447(d) does not apply to cases removed under the FSIA.

A. The Remand Order Is An Appealable Order Under 28 U.S.C. § 1291

1. The court of appeals had appellate jurisdiction under § 1291 because the district court's remand order was a final decision. As this Court has explained, "[w]hen a district court remands a case to a state court, the district court disassociates itself from the case entirely, retaining nothing of the matter on the federal court's docket." *Quackenbush*, 517 U.S. at 714. A remand order thus "puts the litigants in [the] case 'effectively out of court,'" *id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 11 n.11 (1983)), and "amounts to a dismissal of the suit," *Moses H. Cone*, 460 U.S. at 10. Accordingly, this Court held in *Quackenbush* that a remand order generally constitutes an appealable "final decision" within the meaning of § 1291. 517 U.S. at 713-14.

2. Independently, the district court's remand order is appealable under the collateral-order doctrine. *See Osborn v. Haley*, No. 05-593, slip op. at 10 (U.S. Jan. 22, 2007); *Quackenbush*, 517 U.S. at 713-14. The collateral-order doctrine permits appellate review when a district court's order "conclusively decided a contested issue, the issue decided is important and separate from the merits of the action, and the District Court's disposition would be effectively unreviewable later in the litigation." *Osborn*, slip op. at 10. Each of those criteria is met here. *First*, the remand order "conclusively determine[d] an issue that is separate from the merits" – namely, the right of four sovereign entities to litigate in federal court. *Quackenbush*, 517 U.S. at 714. *Second*, this issue is exceedingly important, as Congress recognized when it enacted § 1441(d) and § 1442(a): sovereigns – both foreign and federal – should not be subjected to state-court jurisdiction against their will.[46] *Third*, because the remand order

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[46] *See supra* p. 20 (discussing the importance of a federal forum in cases involving foreign governments); S. Rep. No. 104-366, at 30-31 (1996) ("A Federal forum in [federal agency] cases is important since state court actions against Federal agencies and officers often involve

here "will not be subsumed in any other appealable order entered by the District Court," *Quackenbush*, 517 U.S. at 714, it is effectively unreviewable "later in the litigation" and is therefore a reviewable collateral order for purposes of § 1291. *Osborn*, slip op. at 10.

B. Section 1447(d) Does Not Preclude Appellate Review In This Case

Section 1447(d) provides in relevant part that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). But § 1447(d) "is not dispositive of the reviewability of remand orders in and of itself." *Thermtron*, 423 U.S. at 345. Rather, it must be read *in pari materia* with § 1447(c), *see, e.g.*, *Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145, 2153 (2006), meaning that the question whether § 1447(d) bars review of a particular remand order depends on whether the "remand order[] [was] issued under § 1447(c) and invok[ed] the grounds specified therein," *Thermtron*, 423 U.S. at 346; *accord Osborn*, slip op. at 12; *Quackenbush*, 517 U.S. at 711-12; *Things Remembered*, 516 U.S. at 127-28.

The remand order in this case was not authorized under § 1447(c). Section 1447(c) authorizes remand only when there is "a defect in removal procedure or lack of subject matter jurisdiction." *Kircher*, 126 S. Ct. at 2153. Neither deficiency occurred here.

1. The district court recognized that "the actions were properly removed in the first instance." Pet. App. 20a. As an agency or instrumentality of a foreign state, BC Hydro was statutorily entitled to remove the entire action (not just the claims against it) to federal court under the FSIA,

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complex Federal issues and Federal-State conflicts."), *reprinted in* 1996 U.S.C.C.A.N. 4202; *Willingham v. Morgan*, 395 U.S. 402, 407 (1969) (the federal-officer removal statute reflects a congressional policy that "federal officers, and indeed the Federal Government itself, require the protection of a federal forum").

28 U.S.C. § 1441(d).[47] Independently, the federal-officer removal statute, 28 U.S.C. § 1442, authorized BPA and WAPA to remove the entire suit to federal court.[48] The district court decided that this case should be remanded only after concluding that those three defendants (BC Hydro, BPA, and WAPA) were immune from suit and that Powerex was not an agency or instrumentality of British Columbia under the FSIA. *See* Pet. App. 20a-44a.

Section 1447(c) did not authorize the district court's remand order because that provision allows remand for a defect in subject-matter jurisdiction only when that defect exists at the time of removal.[49] The structure of § 1447(c) demonstrates that the dispositive question for jurisdictional remands is whether subject-matter jurisdiction existed when the notice of removal was filed. The statute explains *what* gives rise to remand orders – jurisdictional and non-jurisdictional "defect[s]." 28 U.S.C. § 1447(c). It also explains *when* a party may bring such "defect[s]" to the district court's attention – "any time before final judgment" for jurisdictional defects, and within 30 days of removal for non-jurisdictional defects. *Id.* Although the statute is silent on whether a jurisdictional "defect"

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[47] *See* Pet. App. 10a (citing *Nolan v. Boeing Co.*, 919 F.2d 1058, 1064 (5th Cir. 1990)); 14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3729.1, at 239-41 (3d ed. 1998) ("Wright & Miller") (§ 1441(d) "permits the removal of the entirety of any state court action at the discretion of the foreign state") (citing cases); H.R. Rep. No. 94-1487, at 32 (FSIA "permits the removal of any . . . action at the discretion of the foreign state, even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the States in which the action has been brought").

[48] *See, e.g., Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998) ("[I]t is settled that the filing of a petition for removal [under § 1442] by a single federal officer removes the entire case to the federal court.") (internal quotation marks omitted); *see also* 14C Wright & Miller § 3727, at 166-68, 171.

[49] Neither the district court nor any party has identified any defect in removal procedure.

requiring remand must be present at the time of removal or may arise thereafter, § 1447(c) must be construed in light of the "longstanding principle that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought'" or removed. *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) (quoting *Mullen v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) (Marshall, C.J.)); *accord Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570 (2004); *Dole Food*, 538 U.S. at 478; *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938). Therefore, the proper reading of § 1447(c) is that Congress intended to authorize a remand based on a defect in subject-matter jurisdiction only when the defect existed at the time of removal.

The history of § 1447(c) confirms that reading of the statute.[50] Before Congress amended § 1447(c) in 1988, that provision authorized a remand to state court "[i]f at any time before final judgment it appears that the case *was removed* improvidently and without jurisdiction." 28 U.S.C. § 1447(c) (1982) (emphasis added). That language plainly directed the district court to consider only defects that existed when the case was removed.[51] In 1988, Congress amended § 1447(c)'s remand provision, but only to clarify that defects in removal procedure are waived if not

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[50] *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 62 (2004) ("[t]he statutory history resolves any ambiguity"); *accord id.* at 66-67 (Kennedy, J., concurring); *id.* at 68 (Thomas, J., concurring); *see also Zedner v. United States*, 126 S. Ct. 1976, 1985 (2006) (concluding that the Court's interpretation "is entirely in accord with the Act's legislative history").

[51] *See, e.g., Price v. PSA, Inc.*, 829 F.2d 871, 873 (9th Cir. 1987) (examining jurisdiction "[a]t the time of removal"); *In re Merrimack Mut. Fire Ins. Co.*, 587 F.2d 642, 645 (5th Cir. 1978) ("the district court should resolve issues relating to its jurisdiction based only on the facts of the case as they existed at the time of removal and should ignore any subsequent developments in the case").

raised within 30 days of removal.[52] That amendment's aim was to preclude parties from belatedly raising defects in removal procedure for strategic reasons.[53]

As amended, § 1447(c) requires motions to remand for non-jurisdictional defects to be filed "within 30 days after the filing of the notice of removal," 28 U.S.C. § 1447(c), whereas jurisdictional defects, as before, may be identified "at any time before final judgment," *id.*; *accord* 28 U.S.C. § 1447(c) (1982). Although Congress thereby altered the time in which non-jurisdictional defects must be identified, nothing suggests that it intended to change the time at which a defect must be present for a remand to be authorized. Thus, § 1447(c) continues to authorize a jurisdictional remand only when the district court lacks subject-matter jurisdiction at the time of removal – as every court of appeals (but one) to have addressed the question has held.[54] *See Nigh*, 543 U.S. at 63-64 (explain-

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[52] *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016(c)(1), 102 Stat. 4642, 4670 (1988). Congress amended the statute again in 1996 to clarify that waivable objections to removal include "any defect other than lack of subject matter jurisdiction." Act of Oct. 1, 1996, Pub. L. No. 104-219, § 1, 110 Stat. 3022, 3022.

[53] *See* H.R. Rep. No. 100-889, at 72 (1988) (noting the "risk that a party who is aware of a defect in removal procedure may hold the defect in reserve as a means of forum shopping if the litigation should take an unfavorable turn"), *reprinted in* 1988 U.S.C.C.A.N. 5982.

[54] *See, e.g., Reddam v. KPMG LLP*, 457 F.3d 1054, 1058 (9th Cir. 2006) ("Where the remand order is not based on defective removal or lack of subject matter jurisdiction at the time of removal, § 1447(c) does not apply and the § 1447(d) restriction does not apply either.") (footnote omitted); *Letherer v. Alger Group LLC*, 328 F.3d 262, 265 (6th Cir. 2003); *Poore v. American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1290-91 (11th Cir. 2000); *Transit Cas. Co. v. Certain Underwriters at Lloyd's*, 119 F.3d 619, 623 (8th Cir. 1997); *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 223 (3d Cir. 1995); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708-09 (7th Cir. 1992); *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1488 (10th Cir. 1991). *But see Linton v. Airbus Indus.*, 30 F.3d 592, 599-600 (5th Cir. 1994) ("[J]urisdictional remands premised on post-removal events are not reviewable."). *Linton* so ruled in light of "the statutory policy of avoiding substantial delays caused by appellate review," *id.* at 600, but failed to address

ing that the Court will not hold that Congress changed a statute's meaning when "[t]he text does not dictate this result; the statutory history suggests otherwise; and there is scant indication Congress meant to change the well-established meaning [when it amended the statute]"); *see also Keene*, 508 U.S. at 209. Accordingly, the district court had jurisdiction at the time of removal (as it recognized), its remand order was not authorized under § 1447(c), and § 1447(d) does not bar appellate review.[55]

2. Even if this Court were to conclude that § 1447(c) authorizes remand orders for jurisdictional defects that arise after proper removal, the district court in this case never lacked subject-matter jurisdiction and thus could not have remanded the case under § 1447(c). Specifically, the district court did not lose jurisdiction after it resolved the federal issues presented by BC Hydro's, BPA's, and WAPA's defenses of sovereign immunity. Even if (as the district court believed) Powerex was not entitled to a federal forum under the FSIA, the district court had jurisdiction over the claims against Powerex. The FSIA and federal-officer removal statutes create "a species of statutorily mandated ancillary subject matter jurisdiction" over claims against non-sovereign parties. 14C Wright & Miller § 3727, at 171.[56] Once the district court disposed of

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either the structure and history of § 1447(c) or the longstanding principle that jurisdiction is determined at the time of removal.

[55] *See Thermtron*, 423 U.S. at 345-46 (reviewing and reversing an unauthorized remand order); *Quackenbush*, 517 U.S. at 712-13 (discretionary abstention-based remand order reviewable on appeal); 14C Wright & Miller § 3740, at 534-36 (noting that courts of appeals have interpreted *Thermtron* to permit review of remand orders where the district court had discretion to hear or to remand the claims).

[56] *See District of Columbia v. MSPB*, 762 F.2d 129, 132-33 (D.C. Cir. 1985) (per curiam) ("If the federal party is eliminated from the suit after removal under [§ 1442], the district court does not lose its ancillary or pendent-party jurisdiction over the state law claims against the remaining non-federal parties."); 14C Wright & Miller § 3727, at 166-68, 171 (federal-officer removal); *id.* § 3729.1, at 239-43 (FSIA removal). Independently, 28 U.S.C. § 1367 granted the district court

the claims against the sovereign parties, the district court had discretion to "decline jurisdiction over the ancillary claims" and remand those claims to state court. *Id.*[57] Discretionary remand orders are not based on a "lack of subject matter jurisdiction" under § 1447(c), *see Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 355 n.11 (1988), and § 1447(d) therefore does not bar appellate review.

3. Nothing in the district court's orders provides a basis for this Court to conclude that § 1447(d) bars appellate review here. This is not a case in which the applicability of § 1447(d) can be determined by looking at "the [district] court's own label" to determine the basis for the remand, *Kircher*, 126 S. Ct. at 2153, because there is no clear label to be found. In its remand order, the district court never explicitly stated that it was remanding the case under § 1447(c) or for lack of subject-matter jurisdiction. *See* Pet. App. 44a. Thus, even if it were the rule under § 1447(d) that the Court may look no further than what the district court "*purported*" to do, *Kircher*, 126 S. Ct. at 2158 (Scalia, J., concurring in part and in the judgment) (citing *Thermtron*, 423 U.S. at 343), it would be appropriate for an appellate court to determine for itself whether the district court in this case remanded on a

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"supplemental jurisdiction" over the claims against Powerex because those claims were part of the same case or controversy as the claims against BC Hydro – claims over which the district court had original jurisdiction under 28 U.S.C. § 1330. *See In re Air Crash Disaster*, 96 F.3d 932, 943 (7th Cir. 1996).

[57] *See MSPB*, 762 F.2d at 133 (when the federal officer is eliminated from the case, "the district court retains the power either to adjudicate the underlying state law claims or to remand the case to state court"); 14C Wright & Miller § 3727, at 171 ("[T]he district court can exercise its discretion and decline jurisdiction over the ancillary claims once the federal agency has dropped out of the case."); *id.* § 3729.1, at 242-43 (when case is removed by a foreign state under § 1441(d), district court has discretion to remand claims against other defendants); *see also* 28 U.S.C. § 1367 (authorizing district courts to decline to exercise supplemental jurisdiction); *Osborn*, slip op. at 17 (district courts have discretion to remand state-law claims after resolution of federal questions).

ground authorized by § 1447(c) because the district court did not explain the basis for its order. *Compare id.* (quoting district court's order remanding "[b]ecause the Court lacks subject matter jurisdiction") *with* Pet. App. 44a ("Accordingly, IT IS HEREBY ORDERED Plaintiffs' Motion to Remand and Motion to Strike and/or Sever Cross-Complaints (Ct. Rec. 58) is GRANTED.").[58]

In any event, this Court's decision in *Kircher* shows that an appellate court may consider whether the district court's remand order was based on a ground authorized by § 1447(c). There, unlike here, the district court explicitly remanded for lack of jurisdiction. *See* 126 S. Ct. at 2153 ("[t]he District Court said that it was remanding for lack of jurisdiction"); *id.* at 2158 (Scalia, J., concurring in part and in the judgment) (quoting district court's remand order). The court of appeals reviewed the district court's remand order after concluding that the order was based on "law that was not jurisdictional at all." *Id.* at 2154. This Court reviewed the legal question before the district court and concluded that it "must be seen as posing a jurisdictional issue." *Id.* at 2155. Although this Court thus disagreed with the court of appeals' determination of whether the district court's remand order was based on the resolution of a jurisdictional question, the Court did not hold that the Seventh Circuit should have stopped simply because the district court labeled its decision as jurisdictional.

Thus, *Kircher* shows that a court of appeals can, consistent with § 1447(d), determine whether the district court's remand order rested on the resolution of a jurisdictional issue. Here, the district court faced the discretionary question whether to remand claims within its ancillary or supplemental jurisdiction – a question to which § 1447(c)

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[58] That conclusion is not affected by the fact that, in orders issued after the remand order, the district court claimed that it remanded under § 1447(c). *See* JA 283, 288. Nothing in this Court's cases suggests that a district court's after-the-fact re-characterization of its remand order should control the scope of appellate review.

"do[es] not apply." *Cohill*, 484 U.S. at 355 n.11. Because the district court's remand order was not based on the resolution (correct or incorrect) of a § 1447(c) issue, § 1447(d) does not bar review. *See Thermtron*, 423 U.S. at 346.

C. Section 1447(d) Does Not Apply To Suits Removed Under The Foreign Sovereign Immunities Act

In any event, § 1447(d) does not bar appellate review here for an additional and independent reason: Congress could not have intended § 1447(d) to confer on a single federal district judge unreviewable authority to deny a foreign sovereign its right under the FSIA to a bench trial in federal court and to relegate that sovereign, instead, to a jury trial in state court. When Congress enacted the FSIA, it created a comprehensive regulatory regime that governs litigation against foreign sovereigns in the United States.[59] In return for conferring upon plaintiffs tools for suing foreign sovereigns, Congress made two guarantees to foreign sovereigns: (1) they will never have to go before a jury, and (2) they will never be subjected to state-court jurisdiction against their will. *See Ruggiero v. Compania Peruana de Vapores*, 639 F.2d 872, 878 (2d Cir. 1981) (Friendly, J.). Congress provided those rights to promote international comity by ensuring that all cases involving foreign sovereigns and their agencies and instrumentalities would be decided in a uniform manner by neutral decision-makers. *See supra* p. 20.

If § 1447(d) were applied to orders remanding cases removed under the FSIA, it would preclude foreign entities from obtaining appellate review of orders relegating them

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[59] *See Verlinden*, 461 U.S. at 488 (the FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities"); H.R. Rep. No. 94-1487, at 6 (Congress enacted the FSIA "to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity").

to state court and subjecting them to jury trials – orders that risk exactly the "adverse foreign relations consequences" that Congress feared. H.R. Rep. No. 94-1487, at 13. As this Court held in *Osborn*, when a statute conflicts with § 1447(d), "only one can prevail." Slip op. at 16; *see also Thermtron*, 423 U.S. at 345-52. Here, § 1447(d) must yield because Congress could not have intended to grant district judges irrevocable authority to decide questions with such sensitive foreign-relations implications. Indeed, considering that Congress chose to preclude appellate review only of orders remanding for defects in removal procedure or lack of subject-matter jurisdiction, "[i]t is inconceivable . . . that Congress intended that a party be entitled to review of a district court's order remanding a case to the state courts on the ground that its own docket is overcrowded," *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 846 (3d Cir. 1991), but be unable to challenge the court's determination that it is not an organ of a foreign state.

Moreover, applying § 1447(d) here would not further the policies of that provision. In § 1447(d), Congress intended to prevent protracted litigation over nothing more than the forum in which the suit would be heard. *See Kircher*, 126 S. Ct. at 2152 ("The policy of Congress opposes 'interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed'") (quoting *United States v. Rice*, 327 U.S. 742, 751 (1946)); *accord Thermtron*, 423 U.S. at 351; *id.* at 354-55 (Rehnquist, J., dissenting). But much more than just the forum is at stake when a district court considers a foreign governmental entity's claim to be an agency or instrumentality under the FSIA. The defendant's status as a foreign state under the FSIA determines not only the forum but also the defendant's right to a bench trial – a central guarantee to foreign states under the FSIA – and its entitlement to special protections governing attachment and

execution. *See Ruggiero*, 639 F.2d at 878; 28 U.S.C. §§ 1441(d), 1610-1611.

Accordingly, § 1447(d) should not be interpreted to preclude an appellate court from reviewing the important question whether the district court wrongly denied a foreign state's right to a federal bench trial. *See Osborn*, slip op. at 2, 3 (Souter, J., concurring in part and dissenting in part) (courts should "disaggregat[e] . . . a remand order from a substantive determination" about the "denial of [a] benefit" bestowed by Congress and "allow[] appeals" on that "important matter"); *Aliota v. Graham*, 984 F.2d 1350, 1353 (3d Cir. 1993) (Alito, J.) (reviewing an important question apart from the propriety of remand decided by the district court in its remand order); *cf. City of Waco v. United States Fid. & Guar. Co.*, 293 U.S. 140, 143 (1934).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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STATUTORY PROVISIONS INVOLVED

28 U.S.C. .§ 1291 provides:

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1367 provides:

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24

of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

28 U.S.C. § 1391(f) provides:

§ 1391. Venue generally

* * * * *

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought –

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

28 U.S.C. § 1441 provides:

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(c)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if –

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determi-

nation of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1442 provides:

§ 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

28 U.S.C. § 1447 provides:

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

28 U.S.C. § 1447 (1982) provides:

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1603 provides:

§ 1603. Definitions

For purposes of this chapter –

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604 provides:

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605(a)(2) provides:

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

* * * * *

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

* * * * *

28 U.S.C. § 1606 provides:

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

The Budget Transparency and Accountability Act, S.B.C., ch. 23 (2000), provides in pertinent part:

Definitions and interpretation

1 (1) In this Act:

"education and health sector organization" means

(a) the following as defined in section 1 of the *College and Institute Act*:

(i) a university;

(ii) an institution,

(b) the following as defined in section 1 of the *School Act*:

(i) a board;

(ii) a francophone education authority,

(c) a board as defined in section 1 of the *Health Authorities Act*,

(d) a hospital as defined in section 1 of the *Hospital Act*,

and includes

(e) a corporation or organization that, under generally accepted accounting principles, is considered to be controlled by an education and health sector organization, and

(f) a corporation or organization that is included in this definition by regulation under section 24 (2) (d) (ii),

but does not include a corporation or organization that is excluded from this definition by regulation under section 24 (2) (d) (ii);

"government organization" means a corporation or other organization that is within the government reporting entity, other than the government itself;

"government reporting entity" means

(a) the government as reported through the consolidated revenue fund,

(b) government corporations other than those that are government corporations solely by reason of being under an Act agents of the government, and

(c) education and health sector organizations,

and includes

(d) each of the corporations or organizations that, under generally accepted accounting principles, is considered to be controlled by a government organization, and

(e) corporations and organizations that are included within the government reporting entity by regulation under section 24(2)(d)(i)

but does not include corporations and organizations that are excluded from the government reporting entity by regulation under section 24(2)(d)(i);

"minister" means

(a) a member of the Executive Council,

(b) in the case of a reference to "the minister", the minister assigned responsibility for the administration of the provision, or

(c) in the case of a reference to "responsible minister", the minister who is the appropriate minister within the meaning of section 24 of the *Financial Administration Act*;

"ministry" means

(a) a ministry of the executive government of British Columbia, or

(b) any part of the executive government of British Columbia not within a ministry that is designated by the Lieutenant Governor in Council as a ministry for the purposes of this Act;

"public accounts" means the public accounts under section 9;

"quarterly report" means a report under section 10;

"secretary to Treasury Board" means

(a) the person appointed under section 3(2) of the *Financial Administration Act*, or

(b) if no person is appointed under that provision, the deputy minister to the minister;

"self-supported government enterprise" means a corporation that

(a) is within the government reporting entity,

(b) is carrying on a business,

(c) provides goods and services to persons outside the government reporting entity as its principal activity, and

(d) in the normal course of its operations, maintains its operations and meets its liabilities substantially from revenue from sources outside the government reporting entity;

"staff utilization" means, for a fiscal year, the full time equivalent of the number of persons employed in the fiscal year whose salaries are paid directly by the taxpayer-supported government reporting entity;

"surplus" or **"deficit"** means the result of the revenues and expenses after including the forecast allowance, if any;

"taxpayer-supported government reporting entity" means the government reporting entity excluding self-supported government enterprises.

(2) To the extent that this Act or regulations under this Act do not otherwise define a word or expression used in this Act, the definitions in the *Financial Administration Act* apply.

(3) Where this Act refers to an action of the government reporting entity, or of the taxpayer-supported government reporting entity, the reference is to be read as an action of the government or of one or more government organizations included within the entity, or both, as applicable.

Part 1 – Fiscal Plan: Budget and Estimates

* * * * *

Estimates content

5 (1) The main estimates for a fiscal year must be prepared in accordance with this section and with the accounting policies as established by Treasury Board.

(2) The main estimates for a fiscal year must include the following:

(a) for the government, the proposed *Supply Act* appropriations for the fiscal year;

(b) for the government reporting entity, for both the fiscal year and the preceding fiscal year,

(i) a statement of the forecast revenues and expenses and the resulting forecast surplus or deficit, and

(ii) schedules of

(A) a reconciliation of that surplus or deficit with the forecast change in debt,

(B) a forecast of the balance sheet as at the end of each of those fiscal years, and

(C) a forecast of total revenues and total expenses, before netting of revenues against expenses or expenses against revenue;

(c) for the taxpayer-supported government reporting entity, for the fiscal year and for the preceding fiscal year, a forecast of staff utilization, except in relation to the staff of education and health sector organizations;

(d) for government organizations in the taxpayer-supported government reporting entity that are not

education and health sector organizations, the forecast of revenues and expenses for each of them whose revenues or expenses are of a material amount in the fiscal year and the preceding fiscal year;

(e) a summary of the accounting policies of the government reporting entity as established by Treasury Board;

(f) any other information the minister considers appropriate.

(3) Nothing in this section requires the Legislative Assembly to vote appropriations other than in respect of the consolidated revenue fund.

When estimates are to be presented

6 (1) Subject to subsection (2), the minister must present the main estimates for a fiscal year to the Legislative Assembly with the budget for that fiscal year, on the third Tuesday in February in the immediately preceding fiscal year.

(2) If

(a) a general election is underway on the third Tuesday in February or as of that date has been recently completed, or

(b) there has been a general election in a fiscal year before passage by the Legislative Assembly of the final *Supply Act* for that fiscal year,

the main estimates referred to in subsection (1) must be presented to the Legislative Assembly no later than 90 days after the post-election appointment of the Executive Council.

* * * * *

Part 2 – Fiscal Reports: Public Accounts and Other Reports

Public accounts

9 (1) Annual public accounts for each fiscal year must be prepared in accordance with this section and with the accounting policies as established by Treasury Board.

(2) The public accounts for a fiscal year must include the following:

(a) for the government reporting entity, for the fiscal year and the preceding fiscal year, financial statements of

(i) the revenues and expenses and the resulting surplus or deficit,

(ii) the balance sheet as at the end of those fiscal years, and

(iii) changes in cash and temporary investments;

(b) for the government reporting entity, a supplementary schedule that includes amounts held and administered in trust;

(c) for the taxpayer-supported government reporting entity,

(i) a statement of the debt guaranteed by that entity as at the end of the fiscal year, and

(ii) a supplementary schedule that includes staff utilization for that fiscal year, except in relation to the staff of education and health sector organizations;

(d) for the government as reported through the consolidated revenue fund, supplementary schedules that include

(i) appropriations for the fiscal year compared to the actual expenditures for that fiscal year,

(ii) assets, debts and obligations written off in that fiscal year under section 17 of the *Financial Administration Act*,

(iii) debts and obligations forgiven in that fiscal year under section 18 of the *Financial Administration Act*,

(iv) remissions made in that fiscal year under section 19 of the *Financial Administration Act*, and

(v) information required by

section 25 (2) *[amounts received by government]*,

section 26 (3) *[liabilities in excess of appropriation]*

section 70 (2) and (3) *[borrowing transactions and leases]*, and

section 74 (3) *[payments on guarantees and indemnities]*

of the *Financial Administration Act*;

(e) a summary of the accounting policies of the government reporting entity as established by Treasury Board;

(f) other information required to be included in the public accounts by Treasury Board or by this or any other Act;

(g) other information the minister considers appropriate;

(h) the report of the Auditor General as required by section 11 (1) of the *Auditor General Act*.

(3) By August 31 in each year, the minister must make public the public accounts for the previous fiscal year.

Quarterly reports

10 (1) Quarterly reports must be prepared in accordance with this section and with the accounting policies as established by Treasury Board.

(2) Each quarterly report must include the following:

(a) for the government reporting entity, statements of

(i) the revenues and expenses, and the resulting surplus or deficit, for the period from April 1 in the

fiscal year to which the report applies to the end of the quarter to which the report applies,

(ii) the debt at the end of the quarter to which the report applies, and

(iii) in respect of the items referred to in subparagraphs (i) and (ii),

(A) the anticipated amounts, in respect of that fiscal year, through that quarter, and

(B) the actual amounts, in respect of the previous fiscal year, through the comparable quarter;

(b) for the government reporting entity, statements of

(i) the forecast of revenues and expenses and the resulting surplus or deficit for the fiscal year to which the quarterly report applies,

(ii) the forecast of the debt as at the end of that fiscal year, and

(iii) in respect of the items referred to in subparagraphs (i) and (ii),

(A) the amounts provided in the estimates in respect of that fiscal year, and

(B) the actual amounts in respect of the previous fiscal year;

(c) a supplementary schedule that presents a forecast of staff utilization of the taxpayer-supported government reporting entity for the fiscal year to which the quarterly report applies, except in relation to the staff of education and health sector organizations;

(d) other information the minister considers appropriate.

(3) A quarterly report must be made public on or before

(a) September 15, in respect of the first 3 months of the fiscal year,

(b) November 30, in respect of the first 6 months of the fiscal year,

(c) February 28, in respect of the first 9 months of the fiscal year, and

(d) May 31, in respect of the preceding fiscal year, if estimates for the current fiscal year have not been presented to the Legislative Assembly by that date.

(4) For a quarterly report for the first 9 months of the fiscal year, the information required under subsection (2) may be made public on the third Tuesday in February of that fiscal year, with the main estimates presented to the Legislative Assembly for the immediately following fiscal year.

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Part 3 – Service Plans

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Service plans for ministries and government organizations

13 (1) Annual service plans for each ministry and each government organization other than an education and health sector organization must be made public in accordance with this section.

(2) In the case of a service plan for a ministry, the plan must

(a) cover the ministry and other appropriations of the responsible minister,

(b) be made public by the responsible minister on the date when the main estimates are presented to the Legislative Assembly for each fiscal year, and

(c) address that fiscal year and the following 2 fiscal years.

(3) In the case of a service plan for a government organization other than an education and health sector organization, the plan must

(a) be made public by the responsible minister on the date when the main estimates are presented to the Leg-

islative Assembly for each fiscal year of the organization, and

(b) address that fiscal year and the following 2 fiscal years.

(4) Subject to section 19 (5) *[exception if disclosure would be harmful]*, a service plan under this section must be consistent with the current government strategic plan and must

(a) include a statement of goals,

(b) identify specific objectives and performance measures,

(c) in relation to a project to which section 14 *[major capital project plans]* applies, include the information required under that section,

(d) include other prescribed information, if applicable,

(e) for a ministry's service plan,

(i) include a statement that the responsible minister is accountable for the basis on which the service plan is prepared and for achieving the specific objectives in that plan, and

(ii) provide for the signature of the responsible minister to that statement,

(f) if expected results that are specified by regulation of Treasury Board, under the *Balanced Budget and Ministerial Accountability Act* for the purpose of section 5 (3) of that Act are pertinent to a ministry's annual service plan,

(i) include a statement that the member of the Executive Council who has responsibility for those results is accountable for achieving them, and

(ii) provide for the signature of the member to that statement, and

(g) include other information the responsible minister or government organization considers appropriate.

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Part 4 – Service Plan Reports

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Annual service plan reports for ministries and government organizations

16 (1) Annual service plan reports for each ministry and each government organization must be made public in accordance with this section.

(2) In the case of an annual service plan report for a ministry, the report must

(a) cover the ministry and other appropriations of the responsible minister,

(b) compare actual results for the preceding fiscal year with the expected results identified in the service plan under section 13 for that fiscal year,

(c) be made public by the responsible minister no later than August 31 in each year,

(d) include a statement that the responsible minister is accountable for those actual results,

(e) provide for the signature of the responsible minister to that statement, and

(f) if expected results that are specified by regulation of Treasury Board, under the *Balanced Budget and Ministerial Accountability Act* for the purpose of section 5 (3) of that Act are pertinent to a ministry's annual service plan report,

(i) include a statement that the member of the Executive Council who has responsibility for those results is accountable for them, and

(ii) provide for the signature of the member to that statement.

(3) In the case of an annual service plan report for a government organization, the report must

(a) compare actual results for the preceding fiscal year with the expected results identified in the service plan under section 13 for that fiscal year, and

(b) be made public by the responsible minister no later than August 31 or the end of 5 months after the end of the preceding fiscal year of the government organization, whichever comes first.

(4) On a date not earlier than 30, nor later than 60, days after the annual service plan report for a government organization specified by regulation of Treasury Board is made public under subsection (3) (b) by the responsible minister, the specified government organization must conduct a public meeting at a location in British Columbia where that organization carries on significant operations, for the purposes of presenting to the public the annual service plan report, required under this section, of that organization.

(5) Each government organization specified under subsection (4) must give at least 14 days notice of the public meeting required under subsection (4) by a notice that states the time, date, place and purpose of the public meeting and other information that may be prescribed.

(6) If another Act requires a responsible minister to present a report to the Legislative Assembly respecting the activities of a ministry or government organization for a fiscal year, the report under this section satisfies that requirement subject to any additional reporting requirements established by the other Act.

(7) An annual service plan report under this section may be combined with a service plan for the following fiscal year under section 13, so long as the service plan is made public in accordance with that section.

Part 5 – General

* * * * *

Government organizations must provide required information

20 (1) Government organizations must provide

(a) in the case of service plans, major capital project plans and annual service plan reports, the minister who is the responsible minister in relation to those plans and reports, and

(b) in the case of the estimates, quarterly reports, public accounts and any other cases, the minister assigned responsibility for the administration of this Act,

with the documents and other information required for that minister to comply with the requirements of this Act.

(2) Without limiting subsection (1), for the purposes of this Act, the applicable minister may require a government organization to provide information as requested by that minister and may establish a date by which the information must be provided.

(3) If information is required under subsection (2), the government organization must provide the information to the applicable minister

(a) by the date established under subsection (2), or

(b) if no date is established, as soon as reasonably practicable.

(4) If a government organization does not provide the information required or requested in accordance with this section, a person authorized in writing by the applicable minister may examine the books, records of account, documents and other records of the government organization for the purpose of obtaining the information.

(5) If an examination is authorized under subsection (4), the government organization and every officer and employee of it must take all necessary steps to

(a) make available the facilities and records of the organization, and

(b) assist in the conduct of the examination.

(6) A person must not hinder or obstruct the person conducting an examination under subsection (4).

The Financial Information Act, R.S.B.C., ch. 140 (1996), provides in pertinent part:

Definitions

1 In this Act:

"corporation" means

(a) a corporation, association, board, commission or society to which a grant or advance may be made, or the borrowings of which may be guaranteed by the government, under the authority of the enactments in Schedule 1, or

(b) a public body, as defined in section 1 of the *Financial Administration Act*, that is listed in Schedule 2;

"minister" means

(a) in respect of the corporations referred to in paragraph (a) of the definition of "corporation", the minister who administers the Acts in Schedule 1, or

(b) in respect of the corporations in Schedule 2, the minister designated by the Lieutenant Governor in Council.

The Financial Information Regulation, B.C. Reg. 371/93 (1993), provides in pertinent part:

Definition

1 In this regulation **"Act"** means the *Financial Information Act*.

* * * * *

Schedule 1

[am. B.C. Reg. 318/2000; 249/2002, ss. 5-7.]

Statements and Schedules of Financial Information

General

1 (1) The following statements and schedules of financial information must be prepared in accordance with section 2 (2) and (3) of the *Financial Information Act* and be collectively titled the "Statement of Financial Information":

(a) a statement of assets and liabilities;

(b) an operational statement;

(c) a schedule of debts;

(d) a schedule of guarantee and indemnity agreements;

(e) a schedule showing remuneration and expenses paid to or on behalf of each employee, as required by section 6;

(f) a schedule showing the payments for each supplier of goods or services, as required by section 7.

(2) Sections 2 to 7 prescribe the minimum financial information to be contained in the statements and schedules prepared in compliance with the Act.

(3) The statements and schedules must be prepared

(a) on a consolidated basis where a parent and subsidiary corporate relationship exists, and

(b) either on a consolidated basis or for each fund where fund accounting is employed.

(4) The Statement of Financial Information must include notes to the financial statements required in sections 2 and 3 that disclose

(a) the accounting principles and policies followed in preparing the financial statements, and

(b) commitments and contingent liabilities of a long term nature.

(5) The Statement of Financial Information must include notes to the schedules and statements required in sections 4 to 7 that disclose the accounting principles and policies followed.

The Financial Administration Act, R.S.B.C., ch. 138 (1996), provides in pertinent part:

Part 1 – Definitions and Application

Definitions

1 In this Act:

"appropriation" means

(a) an appropriation in a *Supply Act*,

(b) a provision in this or another Act that expressly

(i) authorizes or directs payment from or out of the consolidated revenue fund,

(ii) authorizes payment from or out of a special fund, or

(iii) dispenses with the need for another appropriation, or

(c) an appropriation by special warrant under section 24;

"banking instrument" means a cheque, draft, telegraphic or electronic transfer or other similar instrument;

"consolidated revenue fund" means the consolidated revenue fund referred to in section 12;

"currency" means the currency of a country or any other unit of monetary value;

"designated institution" means an institution designated under section 79 (1) (d);

"estimates" means the estimates of revenue and expenditure for a fiscal year presented to the Legislative Assembly, being

(a) the main estimates presented annually, and

(b) any supplementary estimates for the fiscal year;

"expenditure" includes amounts appropriated for amortization, allowances for doubtful accounts or other non-cash expenses and, in relation to this, a reference to paying, spending or otherwise expending amounts includes

the application of non-cash expenses to the purposes for which they are appropriated;

"fiscal year", when used to mean the fiscal year of the government, means the period from April 1 in one year to March 31 in the next year;

"general fund" means the general fund, referred to in section 12 (2), of the consolidated revenue fund;

"government" does not include government corporations;

"government body" means

(a) a government corporation,

(b) a hospital district board, a board of school trustees or a francophone education authority as defined in the *School Act*,

(c) a university or an institution as defined in the *College and Institute Act*,

(c.1) [Repealed 2004-33-15.]

(c.2) the agency as defined in the *Open Learning Agency Act*, and

(d) any other local or Provincial public authority designated by regulation of the Lieutenant Governor in Council;

"government corporation" means a corporation

(a) that is, under an Act, an agent of the government,

(b) of which the government owns, directly or indirectly, more than 50% of the issued voting shares, or

(c) that is controlled by the government, and for the purpose of this definition a corporation is controlled by the government when a majority of the members of the corporation or of its board of directors or board of management consists of either or both of the following:

(i) persons appointed as members by the Lieutenant Governor in Council, by a minister or by an Act;

(ii) public officers acting as public officers;

"investment management corporation" means the British Columbia Investment Management Corporation established under Part 3 of the *Public Sector Pension Plans Act*;

"minister" means a member of the Executive Council;

"Minister of Finance" means the minister who has administration of this Act;

"ministry" means

(a) a ministry of the executive government of British Columbia, or

(b) a branch of the executive government of British Columbia that is not part of a ministry but is designated by the Lieutenant Governor in Council as a ministry for the purposes of this Act;

"money received for another person" means money that is paid to the government or a public officer under an agreement or undertaking, or by way of gift or bequest, and that is to be paid to another person specified in the agreement or undertaking or by the donor of the gift or bequest, but does not include money received as reimbursement for or as a contribution towards expenditures made by the government;

"pension fund" means

(a) a pension fund established under the *Legislative Assembly Allowances and Pension Act* or continued under the *Public Sector Pension Plans Act*,

(b) any pension fund held in trust by the government or a public officer, and

(c) any prescribed pension fund that has been established for the benefit of employees of a government body;

"pooled investment portfolio" means a portfolio of investments or loans, or both, established under section 43;

"property" does not include money or securities;

"public accounts" means the public accounts under section 9 of the *Budget Transparency and Accountability Act*;

"public body" means

(a) an agency of the government,

(b) a board, commission, council or other body of persons, whether or not incorporated, all the members or all the members of the board of management or board of directors of which are appointed by an Act, an order of the Lieutenant Governor in Council or a minister of the government,

(c) a corporation, more than 50% of the shares or ownership of which is, directly or indirectly, vested in the government, or

(d) a corporation, association, board, commission or society to which a grant or advance of public money is made, or the borrowings of which may be guaranteed by the government under the authority of any Act,

but does not include the B.C. Ferry Authority, established under the *Coastal Ferry Act*, or British Columbia Ferry Corporation;

"public debt" means direct debt obligations of the government;

"public money" means all money received, held or collected by, for or on behalf of the government and includes

(a) revenues of the government,

(b) special funds,

(c) money borrowed by the government or received through the issue and sale of securities, and

(d) trust funds,

but does not include money received, held or collected by a government corporation unless that money is payable to the government under an enactment;

"public officer" includes a minister and a person employed in the public service of British Columbia;

"public property" means all property belonging to the government, but does not include property belonging to a government corporation;

"securities" means bonds, debentures, deposit certificates, promissory notes, treasury bills or other evidences of indebtedness, shares and stock, and includes any documents commonly known as securities;

"special account" means an account in the general fund where the authorization to spend money from the account is located in an Act other than a *Supply Act*;

"special fund" means a fund designated as a special fund by the Lieutenant Governor in Council;

"Treasury Board" means the Treasury Board continued by this Act;

"trust funds" means

(a) money held in trust by the government or a public officer, and

(b) pension funds, sinking funds maintained by the government, money received for another person and money paid to the government as a deposit to ensure the doing of any act or thing;

"vote" means an appropriation under a *Supply Act* identified in the main or supplementary estimates as a vote.

* * * * *

Part 2 – Organization

* * * * *

Management of capital expenditures

4.1 (1) Without limiting any relevant authority under another provision of this or any other Act, Treasury Board may make regulations or issue directives respecting the planning, management and reporting of capital expenditures by government and government bodies.

(2) Without limiting subsection (1), Treasury Board may make regulations or issue directives respecting capital expenditures as follows:

(a) requiring government and government bodies to have approval of Treasury Board or its delegate before making commitments to capital expenditures;

(b) establishing conditions on approval required under paragraph (a);

(c) establishing requirements relating to capital management processes, including procurement, contract provisions, project management, financial controls and accounting practices;

(d) establishing requirements for capital plans, business cases, requests for approval, tendering and other procurement documents, progress reports, completion reports and post-expenditure evaluation reports, including establishing requirements respecting their form, content and frequency.

(3) Regulations and directives under this section may establish different requirements or conditions respecting

(a) different classes of capital expenditure as specified by regulation or directive, and

(b) different government bodies or classes of government body.

(4) In addition to any conditions established by regulation or directive, if approval is required under subsection (2)(a), approval in a specific case may be made on conditions Treasury Board or its delegate considers appropriate.

(5) Requirements under this section are additional to those established by any other enactment.

* * * * *

Comptroller General

8 (1) The Lieutenant Governor in Council must appoint a person to be Comptroller General in the Ministry of Finance, and the Comptroller General is an employee under the *Public Service Act*.

(2) The Comptroller General

(a) has access at all times to all ministries and branches of the government and to their records,

(b) may require from any public officer information and explanations necessary for the performance of the Comptroller General's duties,

(c) may, on the direction of the Treasury Board,

(i) require from any officer or employee of a public body information and explanations necessary to enable the Comptroller General to determine whether public money disbursed or spent by the government has been or is being applied for the purpose for which it was appropriated, and

(ii) examine and report on any or all of the financial and accounting operations of a government corporation, and

(d) may examine any person under oath with respect to any matter that, under any Act, the Comptroller General is required or authorized to check, examine or control, and for the purposes of the examination the Comptroller General has the powers, protection and privileges of a commissioner under sections 12, 15 and 16 of the *Inquiry Act*.

* * * * *

Part 4 – Expenditure

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Insurance and Risk Management Account

30 (1) In this section:

"account" means the Insurance and Risk Management Account continued under subsection (2);

"participants" means

(a) government bodies,

(b) ministries, and

(c) persons or public authorities, or classes of persons or public authorities, designated by regulation;

"regulations" means regulations made under subsection (8).

(2) The Insurance and Risk Management Account is continued as a special account for the purpose of providing insurance or risk management services, or both, to participants or for the benefit of participants.

(3) The government may, subject to the regulations,

(a) enter into agreements or make arrangements with participants, and

(b) enter into agreements for the benefit of participants

respecting insurance and risk management services to be provided in relation to the account.

(4) The following must be paid into the account:

(a) earnings of the account;

(b) amounts paid by or in respect of participants under agreements or arrangements made under subsection (3);

(c) amounts required to be paid under the regulations;

(d) amounts appropriated for the account by a *Supply Act*.

(5) The following may be paid out of the consolidated revenue fund:

(a) amounts payable out of the account by the government in respect of an agreement or arrangement made under subsection (3);

(b) amounts required to be paid out of the account in accordance with the regulations.

(6) If an amount to be paid under subsection (5) is less than the balance in the account, it must be paid out of the account.

(7) If an amount to be paid under subsection (5) is greater than the balance in the account, the balance of the account must be paid out and the difference must be recorded as a deficit against the account.

(8) The Lieutenant Governor in Council may make regulations as follows:

(a) designating a person or public authority, or a class of persons or public authorities, as a participant;

(b) designating persons who may enter into agreements or make arrangements under subsection (3) on behalf of the government;

(c) respecting the terms and conditions under which an agreement or arrangement may be made under subsection (3);

(d) respecting amounts required to be paid into the account under subsection (4) or out of the account under subsection (5);

(e) respecting payments made under subsection (5) in the circumstances referred to in subsection (7).

(9) If a designation is made under subsection (8) (b), it may be a designation of a person by name or a designation of a title or office and, if a title or office is designated, the designation applies to every person holding or appointed to that title or office while that person holds that title or office.

* * * * *

Part 8 – Liabilities

* * * * *

Authority to lend money to government bodies

53 (1) Subject to subsection (4), the government may lend money in any currency to government bodies.

(2) The Lieutenant Governor in Council may authorize the Minister of Finance to make loans on behalf of the government to government bodies under this or another Act.

(3) In an authorization under subsection (2), the Lieutenant Governor in Council

(a) must establish a maximum amount in accordance with section 53.1, and

(b) may establish other restrictions, limits or conditions on the lending of money under the authorization.

(4) The government may not lend money to government bodies under the authority of this or another Act

(a) without an authorization of the Lieutenant Governor in Council under subsection (2),

(b) contrary to any restrictions, limits or conditions on the borrowing authority of government bodies unless permitted by section 53 (5) or 54 (6),

(c) in excess of the maximum amount established under subsection (3) (a), or

(d) contrary to any restrictions, limits or conditions established under subsection (3) (b).

(5) If a loan to a government body is authorized under subsection (2), any approval or determination by the Lieutenant Governor in Council or the Minister of Finance that any other Act requires respecting borrowing by the government body is not required with respect to that loan.

* * * * *

Assumption of government body debt obligations

56.3 (1) Subject to the approval of the Lieutenant Governor in Council, the government may assume debt obligations of a government body with the agreement of the government body.

(2) On the assumption by the government of debt obligations under subsection (1),

(a) the debt obligations become enforceable against the government,

(b) the government body is released from all liability for the debt obligations, and

(c) the assets of any sinking fund for the repayment of the debt obligations become the assets of the government.

(3) In this section, **"debt obligations"** includes parts of "debt obligations".

* * * * *

Regulations respecting government corporations

75 (1) The Lieutenant Governor in Council may make regulations as follows:

(a) respecting the terms and conditions, and, despite any other Act, restricting or limiting the circumstances, under which a government corporation may enter banking arrangements, lend money, borrow money, give a guarantee or indemnity, give, grant or assume a mortgage or lien on property or acquire property by way of lease;

(b) appointing the Minister of Finance as fiscal agent for a government corporation;

(c) defining the role and powers of the Minister of Finance as fiscal agent for a government corporation;

(d) prescribing fees to be paid to the government by a government corporation for services provided whether or not there is an obligation on the government to provide the services.

(2) Without limiting subsection (1) (a), the regulations may do any of the following:

(a) designate persons by whom a guarantee or indemnity may be given on behalf of a government corporation;

(b) specify circumstances in which, before a guarantee or indemnity is given, approval must be obtained from the Lieutenant Governor in Council, the Treasury Board, a minister or another person;

(c) require that in specified circumstances, the maximum amount of the liability in respect of which the Treasury Board, a minister or other person may approve a guarantee or indemnity is limited to a prescribed amount;

(d) place those constraints, conditions and limitations on the giving of guarantees and indemnities and on the exercise of the power of approval referred to in paragraph (b) or (c) that are considered desirable.

(3) If a designation is made under subsection (2) (a), it may be a designation of a person by the person's name or it may be a designation of a title or office and, if a title or office is designated, the designation applies to every person holding or appointed to that title or office while the person holds that title or office.

(4) A regulation under this section may be made applicable to government corporations generally or to a government corporation specified in the regulation.

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Part 9.1 – Commodity Derivatives

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Commodity derivatives by government bodies

79.3 (1) Despite any other Act, a government body may not enter into commodity derivatives except in accordance with this section.

(2) Subject to any restriction, limit or condition established under subsection (3), a government body specified under that subsection may enter into commodity derivatives, including commodity derivatives with or through the agency of the Minister of Finance.

(3) The Treasury Board may, by regulation,

(a) specify government bodies for the purposes of this section, and

(b) establish restrictions, limits and conditions on the authority of a government body specified under paragraph (a) to enter into commodity derivatives.

(4) At the request of a government body specified under subsection (3), the Minister of Finance may act as its agent in exercising the authority given to that body under subsection (2).

* * * * *

The Commodity Derivatives by Government Bodies Regulation, B.C. Reg. 407/2000 (2000), provides:

COMMODITY DERIVATIVES BY GOVERNMENT BODIES REGULATION

Specified government bodies

1 (1) The following are specified as government bodies for the purposes of section 79.3 of the *Financial Administration Act*:

(a) British Columbia Hydro and Power Authority;

(b) British Columbia Power Exchange Corporation.

(2) The following are specified as government bodies for the purposes of section 79.3 of the *Financial Administration Act*:

(a) British Columbia Ferry Corporation.

Restrictions, limits and conditions to enter into commodity derivatives

2 (1) The authority of a government body specified in section 1(1) to enter into commodity derivatives is subject to the following restrictions, limits and conditions:

(a) British Columbia Hydro and Power Authority must have established and be maintaining a risk management committee;

(b) the risk management committee referred to in paragraph (a) must include among its responsibilities the development and implementation of a risk management policy with respect to commodity derivatives entered into by any government body specified in section 1(1).

(2) The authority of British Columbia Ferry Corporation to enter into commodity derivatives is subject to the following restrictions, limits and conditions:

(a) British Columbia Ferry Corporation must have established and be maintaining a risk management committee;

(b) the risk management committee referred to in paragraph (a) must include among its responsibilities the development and implementation of a risk management policy with respect to commodity derivatives entered into by British Columbia Ferry Corporation;

(c) the commodity derivatives must only be entered into with or through the agency of the Minister of Finance and Corporate Relations.

The Income Tax Act, R.S.C., ch. 1 (5th Supp.) (1985), provides in pertinent part:

Income Tax Act
PART I INCOME TAX
DIVISION H EXEMPTIONS

Miscellaneous exemptions

149. (1) No tax is payable under this Part on the taxable income of a person for a period when that person was

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(d) a corporation, commission or association all of the shares (except directors' qualifying shares) or of the capital of which was owned by one or more persons each of which is Her Majesty in right of Canada or Her Majesty in right of a province;

(d.1) a corporation, commission or association not less than 90% of the shares (except directors' qualifying shares) or of the capital of which was owned by one or more persons each of which is Her Majesty in right of Canada or Her Majesty in right of a province;

(d.2) a corporation all of the shares (except directors' qualifying shares) or of the capital of which was owned by one or more persons each of which is a corporation, commission or association to which this paragraph or paragraph (d) applies for the period;

(d.3) a corporation, commission or association not less than 90% of the shares (except directors' qualifying shares) or of the capital of which was owned by

(i) one or more persons each of which is Her Majesty in right of Canada or a province or a person to which paragraph (d) or (d.2) applies for the period, or

(ii) one or more municipalities in Canada in combination with one or more persons each of which is Her Majesty in right of Canada or a province or a person to

which paragraph 149(1)(d) or 149(1)(d.2) applies for the period;

(d.4) a corporation all of the shares (except directors' qualifying shares) or of the capital of which was owned by one or more persons each of which is a corporation, commission or association to which this paragraph or any of paragraphs (d) to (d.3) applies for the period;

(d.5) subject to subsections 149(1.2) and 149(1.3), a corporation, commission or association not less than 90% of the capital of which was owned by one or more municipalities in Canada, if the income for the period of the corporation, commission or association from activities carried on outside the geographical boundaries of the municipalities does not exceed 10% of its income for the period;

(d.6) subject to subsections (1.2) and (1.3), a particular corporation all of the shares (except directors' qualifying shares) or of the capital of which was owned by one or more persons each of which is a corporation, commission or association to which paragraph (d.5) or this paragraph applies for the period if the income for the period of the particular corporation from activities carried on outside

(i) if paragraph 149(1)(d.5) applies to the other corporation, commission or association, the geographical boundaries of the municipalities referred to in that paragraph in its application to that other corporation, commission or association, or

(ii) if this paragraph applies to the other corporation, commission or association, the geographical boundaries of the municipalities referred to in subparagraph 149(1)(d.6)(i) in its application to that other corporation, commission or association,

does not exceed 10% of its income for the period;

* * * * *

The Income Tax Act, R.S.B.C., ch. 215 (1996), provides in pertinent part:

* * * * *

Part 1 – Income Tax

* * * * *

Division 4 – Individual and Corporate Income Tax

* * * * *

Exemptions

27 (1) Subject to section 25, no tax is payable under this Act by any person for a period when the person

(a) was exempt from tax by virtue of section 149 (1) of the federal Act, or

(b) was a non resident owned investment corporation.

(2) Any definitions or descriptions in the federal Act applying to a person referred to in subsection (1) apply for the purposes of this Act unless otherwise provided.

(3) [Repealed 1999-47-12.]

* * * * *

The Land Act, R.S.B.C., ch. 245 (1996), provides in pertinent part:

* * * * *

Reserves

15 (1) In this section and section 16, **"government body"** means the Provincial government, a government corporation as defined in paragraphs (b) and (c) of the definition of "government corporation" in the *Financial Administration Act*, the federal government or a prescribed organization.

(2) The Lieutenant Governor in Council may, by order, reserve Crown land from disposition under this Act for any purpose that the Lieutenant Governor in Council considers advisable in the public interest, including for the use of a government body.

(3) An order under subsection (2) may authorize a government body to place, construct, maintain or operate any works, structures or other improvements on the reserved land.

(4) An order under subsection (2) may be subject to any terms and conditions the Lieutenant Governor in Council considers necessary or advisable.

(5) The Lieutenant Governor in Council may amend or cancel all or part of a reserve established under this or a former Act.

(6) An order under subsection (2) does not affect the minister's powers under section 14.

* * * * *

The Lobbyists Registration Act, S.B.C., ch. 42 (2001), provides in pertinent part:

Interpretation

1 (1)

In this Act:

"client" means a person or organization on whose behalf a consultant lobbyist undertakes to lobby;

"consultant lobbyist" means an individual who, for payment, undertakes to lobby on behalf of a client;

"in-house lobbyist" means an individual who is employed by a person or organization and a significant part of whose duties as an employee is to lobby on behalf of

(a) the employer, or

(b) if the employer is a corporation, on behalf of any subsidiary of the employer or any corporation of which the employer is a subsidiary;

"lobby" means,

(a) in relation to either a consultant lobbyist or an in-house lobbyist, to communicate with a public office holder in an attempt to influence

(i) the development of any legislative proposal by the government of British Columbia or by a member of the Legislative Assembly,

(ii) the introduction of any bill or resolution in the Legislative Assembly or the amendment, passage or defeat of any bill or resolution that is before the Legislative Assembly,

(iii) the making or amendment of any regulation as defined in the *Regulation Act* or any order in council,

(iv) the development or amendment of any program or policy of the government of British Columbia, or

(v) the awarding of any contract or financial benefit by or on behalf of the government of British Columbia, and

(b) in relation only to a consultant lobbyist, to arrange a meeting between a public office holder and any other person;

"organization" means

(a) a business, trade, industry, professional or voluntary organization,

(b) a trade union or labour organization,

(c) a chamber of commerce or board of trade,

(d) a charitable or non-profit organization, association, society, coalition or interest group, and

(e) a government, other than the government of British Columbia;

"payment" means money or anything of value and includes a contract, promise or agreement to pay money or anything of value;

"public office holder" means

(a) a member of the Legislative Assembly and any person on the member's staff,

(b) an officer or employee of the government of British Columbia,

(c) a person who is appointed to any office or body by or with the approval of the Lieutenant Governor in Council, other than a person appointed on the recommendation of the Legislative Assembly,

(d) a person who is appointed to any office or body by or with the approval of a minister of the government of British Columbia, and

(e) an officer, director or employee of any government corporation as defined in the *Financial Administration Act*,

but does not include a judge or a justice of the peace;

"registrar" means the person designated as registrar under section 7(1);

"senior officer", in relation to an organization, means the most senior officer of the organization who is compensated for performing his or her duties;

"undertaking" means an undertaking by a consultant lobbyist to lobby on behalf of a client, but does not include an undertaking by an employee to do anything

(a) on the sole behalf of the employer, or

(b) if the employer is a corporation, at the direction of the employer on behalf of a subsidiary of the employer or any corporation of which the employer is a subsidiary.

(2) An officer who is compensated for performing his or her duties is considered to be an employee for the purposes of the definition of "in-house lobbyist" in subsection (1) and for the purposes of sections 3 and 4.

(3) For the purposes of this Act, the following are not considered to be in-house lobbyists:

(a) officers and employees of the Legislative Assembly appointed under section 39 of the *Constitution Act*;

(b) persons appointed under the *Public Service Act*;

(c) employees of prescribed government corporations as defined in the *Financial Administration Act* or of other prescribed government institutions.

* * * * *

Heritage Special Direction No. HC2 to the British Columbia Utilities Commission, Order in Council No. 1123 (Nov. 27, 2003), provides:

PROVINCE OF BRITISH COLUMBIA

ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

Order in Council No. 1123 Approved and Ordered Nov. 27, 2003

/s/ [Illegible]
Lieutenant Governor

Executive Council Chambers, Victoria

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that, effective April 1, 2004, the attached Special Direction No. HC2 is made.

/s/ [Illegible]
Minister of Energy and Mines

/s/ [Illegible]
Presiding Member of the Executive Council

HERITAGE SPECIAL DIRECTION NO. HC2 TO THE BRITISH COLUMBIA UTILITIES COMMISSION

Definitions

1 In this Special Direction:

"Act" means the *BC Hydro Public Power Legacy and Heritage Contract Act*;

"debt" means, in relation to a fiscal year of the authority, the amount obtained by

(a) adding the outstanding amounts of the following at the end of the fiscal year:

(i) borrowings;

(ii) bonds;

(iii) notes;

(iv) debentures, and

(b) deducting from the amount determined under paragraph (a) the sum of the of the following amounts at the end of the fiscal year:

(i) sinking funds;

(ii) temporary investments;

(iii) repurchased debt;

"equity" means the sum of the following amounts at the end of the fiscal year:

(a) retained earnings;

(b) deferred revenue;

(c) contributions arising from the Columbia River Treaty;

(d) contributions in aid of construction;

"government policy directive" means a directive in writing to the authority from the minister charged with the administration of the *Hydro and Power Authority Act*;

"heritage contract" means the document attached as Appendix A to this Special Direction;

"heritage deferral account" means an account established under section 7 (a) of this Special Direction;

"heritage energy" has the same meaning as in the heritage contract;

"heritage payment obligation" has the same meaning as in the heritage contract;

"heritage resources" has the same meaning as in the heritage contract;

"trade income" means the audited net income of Powerex Corp., according to generally accepted accounting principles, adjusted by,

(a) if the audited net income is less than zero, adding the amount necessary to make it zero, and

(b) where audited net income is greater than $200 million, subtracting any amounts in excess of $200 million;

"transmission rate customers" means industrial or commercial customers of the authority who are eligible for service under rates designed by the commission under section 3.

Application

2 This Special Direction is issued to the commission under sections 3 and 4 of the Act.

Consideration in designing rates for transmission rate customers

3 (1) In designing rates for the authority's transmission rate customers, the commission must ensure that those rates are consistent with recommendations #8 to #15 inclusive in the commission's report and recommendations to the Lieutenant Governor in Council dated October 17, 2003.

(2) Without limiting subsection (1), the commission must ensure the following:

(a) the rates for the authority's transmission rate customers are subject to

(i) the terms and conditions found in Supplements 5 and 6 to the authority's tariff, and

(ii) any other terms and conditions the commission considers appropriate for those rates;

(b) customers who own multiple plants under common ownership may engage in load aggregation for energy, if each plant

(i) is in operation, and

(ii) meets the requirements to be a transmission rate customer that are set out in the authority's tariff, or is otherwise authorized by the commission to be treated as a transmission rate customer;

(c) the authority publishes the Tier 2 rate in the manner and with the frequency required by the commission.

Basis for establishing authority revenue requirements

4 Subject to section 7, in regulating and setting rates for the authority, the commission must ensure that those rates allow the authority to collect sufficient revenue in each fiscal year to enable the authority to

(a) provide reliable electricity service,

(b) meet all of its debt service, tax and other financial obligations,

(c) comply with government policy directives, including, without limitation, government policy directives requiring the authority to construct, operate or extend a plant or system, and

(d) achieve an annual rate of return on equity equal to the pre-income tax annual rate of return allowed by the commission to the most comparable investor-owned energy utility regulated under the *Utilities Commission Act*.

Determining the cost of energy

5 In setting the authority's rates, the commission

(a) must treat the heritage contract as if it were a legally binding agreement between 2 arms-length parties,

(b) must determine the energy required by the authority to meet its domestic service obligations and must determine the cost to the authority of the portion of that required energy that is in excess of the energy supplied under the heritage contract,

(c) may employ any mechanism, formula or method referred to in section 60 (1) (b.1) of the *Utilities Commission Act*, and

(d) unless a different mechanism, formula or method is employed under paragraph (c), must ensure that electricity used by the authority to meet its domestic service obligations is provided to customers on a cost-of-service basis.

Return on equity

6 In setting the authority's rates, the commission must allow the authority an annual rate of return on equity calculated using forecast consolidated operating income, which forecast consolidated operating income is calculated on the basis of forecast trade income.

Deferral accounts

7 When regulating and setting rates for the authority, the commission:

(a) must allow the authority to establish one or more accounts to reflect and record variances between

(i) the heritage payment obligation and the authority's forecast of the heritage payment obligation, and

(ii) the trade income and the authority's forecast of trade income,

(b) may allow the authority to establish one or more other deferral accounts for other purposes, and

(c) must set or regulate the authority's rates in such a way as to allow the deferral accounts to be cleared from time to time and within a reasonable period of time.

Annual distributable surpluses allowed

8 When regulating and setting rates for the authority, the commission must ensure that those rates allow the authority to allocate annual distributable surpluses in the manner specified by the Lieutenant Governor in Council under section 4 of the Act or section 35 of the *Hydro and Power Authority Act*.

Appendix A to Heritage Special Direction No. HC2

Heritage Contract

WHEREAS on November 25, 2002, the Province of British Columbia released Energy for Our Future, A Plan for B.C. (the "Energy Plan");

AND WHEREAS the Energy Plan outlines certain policy actions designed to ensure British Columbians have continued access to sufficient supplies of dependable low-cost electricity;

AND WHEREAS the Energy Plan provides in Policy Action #1 that a legislated heritage contract will be created between BC Hydro's generation line-of-business and BC Hydro's distribution line-of-business for an initial term of 10 years.

THEREFORE, BCH Distribution and BCH Generation (the "parties") agree as follows.

Definitions

1 In this Agreement:

"Act" means the *BC Hydro Public Power Legacy and Heritage Contract Act*;

"Agreement" means this Heritage Contract including Schedule A;

"Ancillary Service Requirements" means services necessary to deliver energy;

"BC Hydro" means the British Columbia Hydro and Power Authority;

"BCH Distribution" means BC Hydro's distribution line-of-business;

"BCH Generation" means BC Hydro's generation line-of-business;

"Commission" means the British Columbia Utilities Commission;

"heritage electricity" means the capacity, energy and ancillary services that BCH Generation is required to supply to BCH Distribution under this Agreement;

"heritage energy" means

(a) subject to paragraph (b), 49 000 GW.h per year less the energy generated for delivery under the Skagit Valley Treaty, or

(b) the quantity of energy determined by the Commission under section 8 of this Agreement to be heritage energy;

"heritage payment obligation" means

(a) subject to paragraph (b), the annual payment determined in accordance with the procedure set out in Schedule A to this Agreement, or

(b) the annual payment determined by the Commission under section 8 of this Agreement to be the heritage payment obligation;

"heritage resources" means the Electric Facilities and Thermal Facilities described in Schedule A to the Terms of Reference, together with

(a) the related civil works and plant, and

(b) potential future investments that increase the capacity, energy or ancillary service capability of such facilities, including potential future units 5 and 6 at Mica and potential future units 5 and 6 at Revelstoke;

"Order" means an order of the Commission;

"Terms of Reference" means Schedule A, Terms of Reference, to Order-in-Council No. 0253/2003;

"Transfer Pricing Agreement" means the Transfer Pricing Agreement for Electricity and Gas dated April 1, 2003 between BC Hydro and Powerex Corp. as amended from time to time;

"Year" means fiscal year.

Electricity Supply

2 BCH Generation must provide the full capacity of the heritage resources to BCH Distribution on a priority call basis.

Obligation to supply

3 BCH Generation must supply to BCH Distribution, in each Year, the heritage energy or such lesser amount of energy as may be required by BCH Distribution.

Obligation to deliver

4 BCH Generation will deliver the heritage energy to BCH Distribution at the various points of interconnection of the generating stations included in the heritage resources with the BC Hydro transmission grid or at points of interconnection with other utilities, as appropriate.

Responsibility for obtaining transmission services

5 BCH Distribution will be responsible for obtaining transmission services for energy provided to BCH Distribution.

Ancillary services

6 The parties may use the capacity available to them under section 2 to deliver energy to meet customer demand and to satisfy the parties' Ancillary Service Requirements, regardless of whether provision for self-supply is made under any tariff.

Payment

7 BCH Distribution must, on or before the end of each Year, pay to BCH Generation an amount equal to the heritage payment obligation.

Adjustment

8 The parties acknowledge that

(a) the Commission may, by Order, modify one or both of the definitions of "heritage energy" and "heritage payment obligation" if the commission is satisfied that a change in circumstances has permanently affected

(i) the capability of the heritage resources to provide one or both of capacity and energy, or

(ii) the authority's cost of generating the heritage energy, and

(b) any such modification will automatically modify the heritage energy or the heritage payment obligation, as the case may be, without further action by the parties.

Information exchange and cooperation

9 Each party will continue to freely provide the other with any requested information to facilitate the coordinated and optimal operation of the BC Hydro system.

Dispute resolution

10 (1) The parties will make reasonable efforts to resolve disputes arising in relation to this Agreement at the staff level.

(2) As needed, issues may be dealt with by management levels within each party to achieve timely resolution.

(3) Issues that cannot be resolved in a timely manner at senior management levels, may be referred by either party to the commission for resolution.

Term and termination

11 (1) This Agreement shall commence on April 1, 2004.

(2) This Agreement may be terminated by government, with 5 years notice, any time after April 1, 2009 and if such notice is given, the Agreement shall terminate at the

end of the 5-year notice period without any further action by the parties or the government.

Dated as of this ..... day of ....., 2004.

.....

BCH Distribution

.....

BCH Generation

Schedule A

Heritage Payment Obligation

The heritage payment obligation for any Year is the amount determined by

(a) adding those of the following costs incurred by BCH Generation in the Year that the Commission orders may be included in the heritage payment obligation:

(i) cost of energy such as the cost of water rentals and energy purchases, including purchases of gas and electricity, required to supply heritage electricity;

(ii) operating costs such as the costs of operating and maintaining the heritage resources, including an allocation of corporate costs;

(iii) all costs of owning the heritage resources, including, without limitation, depreciation, interest, finance charges and other asset related expenses;

(iv) all costs or payments related to generation-related transmission access required by the heritage resources;

(v) the applicable return on equity on investments in heritage resources based on Heritage Special Direction No. HC2 to the Commission under the authority of the Act, and

(b) by subtracting from the sum obtained under paragraph (a), any revenues BCH Generation receives from other services provided from the heritage resources, including, without limitation,

(i) revenues related to Skagit Valley Treaty obligations,

(ii) revenues from provision of ancillary services to the transmission operator in respect of third party use of the transmission system, and

(iii) revenues from the sale of surplus hydro electricity under section 5 of the Transfer Pricing Agreement.

Heritage Special Directive No. HC1 to the British Columbia Hydro and Power Authority, Order in Council No. 1125 (Nov. 27, 2003), provides:

PROVINCE OF BRITISH COLUMBIA

ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

Order in Council No. 1125 Approved and Ordered Nov. 27, 2003

/s/ [Illegible]
Lieutenant Governor

Executive Council Chambers, Victoria

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that, effective July 1, 2004,

(a) Special Directive No. 4, dated March 30, 2000 and made under section 35 of the *Hydro and Power Authority Act*, is repealed, and

(b) the attached Special Directive No. HC1 is made.

/s/ [Illegible]
Minister of Energy and Mines

/s/ [Illegible]
Presiding Member of the Executive Council

HERITAGE SPECIAL DIRECTIVE NO. HC1 TO THE BRITISH COLUMBIA UTILITIES COMMISSION

Definitions

1 In this Special Directive:

"Act" means the *Hydro and Power Authority Act*,

"debt" means, in relation to a fiscal year of the authority, the amount obtained by

(a) adding the outstanding amounts of the following at the end of the fiscal year:

(i) borrowings;

(ii) bonds;

(iii) notes;

(iv) debentures, and

(b) deducting from the amount determined under paragraph (a) the sum of the of the following amounts at the end of the fiscal year:

(i) sinking funds;

(ii) temporary investments;

(iii) repurchased debt;

"distributable surplus" means, for a fiscal year,

(a) the consolidated net income, earned by the authority and its subsidiaries from all sources, as reflected in the authority's audited consolidated financial statements for that fiscal year, less

(b) the finance charges capitalized during the fiscal year, net of depreciation charged on capitalized finance charges;

"equity" means the sum of the following amounts at the end of the fiscal year:

(a) retained earnings;

(b) deferred revenue;

(c) contributions arising from the Columbia River Treaty;

(d) contributions in aid of construction.

Application

2 This Special Directive is issued to the authority under section 35 of the Act.

Annual payment

3 On or before June 30 of each year after 2004, the directors of the authority must cause the authority to pay to the government, for deposit into the consolidated revenue fund, an amount equal to

(a) 85% of the authority's distributable surplus for the previous fiscal year of the authority, or

(b) if the payment required under this section would result in the debt/equity ratio of the authority exceeding 80:20, the greatest amount that can be paid by the authority without causing the authority's debt/equity ratio, after the payment is made, to exceed 80:20.

(3)

AUG 9 - 2005

No. 05-85

IN THE

Supreme Court of the United States

POWEREX CORP.,
Petitioner,
v.
RELIANT ENERGY SERVICES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT RELIANT ENERGY SERVICES IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether petitioner Powerex Corporation is an "organ of a foreign state" under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1603(b)(2).

LIST OF PARTIES

Reliant adopts the list of parties set forth in the petition as if set forth fully herein.

RULE 29.6 STATEMENT

Reliant Energy Services, Inc. is a wholly-owned subsidiary of Reliant Energy, Inc., a publicly traded company. No publicly held company owns 10% or more of the stock of Reliant Energy, Inc.

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BRIEF OF RESPONDENT RELIANT ENERGY SERVICES IN SUPPORT OF THE PETITION

Respondent Reliant Energy Services, Inc. ("Reliant") respectfully submits this brief in support of the Petition for a Writ of Certiorari filed by Powerex Corp. ("Powerex").

OPINIONS BELOW

The district court's opinion (Pet. App. 18a-44a) is unreported. The court of appeals' opinion (Pet. App. 1a-17a) is reported at 391 F.3d at 1011.

JURISDICTION

The court of appeals entered its judgment on December 8, 2004, and denied rehearing on March 3, 2005. Pet. App. 45a. On May 23, 2005, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including July 1, 2005. On June 22, 2005, Justice O'Connor further

extended the time to and including July 15, 2005, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions, including 28 U.S.C. §§ 1441, 1447, and portions of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(a), (b), are set forth in the Appendix at 1a-3a.

STATEMENT

For present purposes, Reliant adopts Powerex's statement of the case. Reliant, however, adds as follows:

1. The named plaintiffs brought this lawsuit on behalf of a putative class that includes certain retail electric customers in California in 2000 and 2001. Plaintiffs allege that Reliant and certain other defendants "combin[ed] to withhold supply from electricity markets and collud[ed] to fix electricity prices," in violation of California's antitrust and unfair competition laws, and that their conduct caused what has become known as the California energy crisis of 2000-2001.

The complaint, however, named only a small number of the many entities that participated in California wholesale electric markets during the relevant period. Public and private power companies throughout 13 western states, Canada, and Mexico traded and supplied power through the interconnected transmission grid that services California, and they continue to do so today. Sellers include traders, independent generators (such as Reliant), and numerous public entities—domestic and international—including municipal utility districts, public irrigation districts, and federal and state agencies.

According to the complaint, the unlawful conduct occurred in markets operated by the California Power Exchange ("PX") and the California Independent System Operator ("ISO"). Under the PX and ISO tariffs filed with

the Federal Energy Regulatory Commission, Reliant and the other market participants did not set the prices at which they sold wholesale power. Rather, the PX or ISO set a single "market clearing price" or "MCP" based on the "highest accepted offer to sell" for a particular timeframe. In general, the MCP applied to all sellers, regardless of the bids.

Because of that structure, the MCP was often set by market participants other than the ones named as defendants in the original complaint. Indeed, the bids of numerous entities trading in the California electricity markets factored into the MCP in precisely the same manner as the bids of Reliant and the other parties that plaintiffs named as defendants. Yet the plaintiffs omitted most of those entities from their complaint.

2. Reliant denies that it violated any state antitrust or unfair competition law,[1] and has set forth additional defenses, including preemption under the Federal Power Act and the filed rate doctrine.[2] Nonetheless, because many entities other than the ones named in plaintiffs' lawsuit had participated in the market in the same manner as Reliant and the other original defendants, and because many could be held liable to the same extent as Reliant under plaintiffs' theories, Reliant cross-complained against other major participants in the California markets, including Powerex.

---

[1] Reliant believes that California's energy crisis was caused by a variety of factors, including the State's decision to have wholesale energy prices determined in volatile short-term bid markets with single market clearing prices.

[2] Claims like plaintiffs' consistently have been dismissed on preemption and filed-rate grounds. See *California ex rel. Lockyer* v. *Dynegy, Inc.*, 375 F.3d 831 (9th Cir. 2004), cert. denied, 125 S. Ct. 1836 (2005); *Public Util. Dist. No. 1 of Grays Harbor Washington* v. *Idacorp, Inc.*, 379 F.3d 641 (9th Cir. 2004); and *Public Util. Dist. No. 1 of Snohomish County* v. *Dynegy Power Mktg., Inc.*, 384 F.3d 756 (9th Cir. 2004), cert. denied, 125 S. Ct. 2957 (2005).

Powerex and several other cross-defendants (*e.g.*, BC Hydro and the Bonneville Power Administration), in turn, removed the case to federal court. Plaintiffs moved for a remand to state court. The district court held that the case was properly removed in the first instance because many of the removing cross-defendants were governmental entities entitled to removal under 28 U.S.C. §§ 1441, 1442. It also granted the motions of several cross-defendants for dismissal on (for example) sovereign immunity grounds. The district court then remanded the case—including the claims against Powerex—to state court, and the Ninth Circuit affirmed. Powerex, those courts held, is not "an organ" of the provincial government of British Columbia entitled to insist on a federal forum under the Foreign Sovereign Immunities Act and 28 U.S.C. § 1441(d). For the reasons stated below, Reliant agrees with Powerex that the district court and Ninth Circuit erred, and that the issue warrants this Court's review.

REASONS FOR GRANTING THE PETITION

Enacted in 1976, the Foreign Sovereign Immunities Act (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (28 U.S.C. 1330, 1602, *et seq.*) establishes "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The FSIA broadly defines "foreign state" as including both a sovereign nation and any "agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). The phrase "agency or instrumentality" includes entities that are separate legal persons from the state (*e.g.*, corporations) if they are "an organ of a foreign state" and they meet certain further requirements. *See* 28 U.S.C. § 1603(b)(1)-(3).

Whether or not an entity qualifies as an "organ" of a foreign state is often a critical question—not merely for

individual litigants, but also for foreign governments and the federal courts. Under the FSIA, organs of foreign states are subject to suit only under specified circumstances and are entitled to special protections. See, *e.g.*, 28 U.S.C. §§ 1604, 1605, 1607. Of particular importance here, foreign sovereigns are entitled to remove and have their cases heard in federal rather than state court. See 28 U.S.C. § 1441(d).

In this case, the Ninth Circuit concluded that Powerex was not an "organ" of the provincial government of British Columbia and thus not a "foreign state" within the meaning of the FSIA. Accordingly, it held that the claims against Powerex were properly remanded to state court. Reliant agrees with Powerex's contention (Pet. 18-24) that the test articulated and applied by the Ninth Circuit for determining Powerex's status under the FSIA differs from the more comprehensive, fact-sensitive tests employed by the Second, Third and Fifth Circuits, and that the Ninth Circuit's test is contrary to Congress's intent in enacting the FSIA. The Ninth Circuit's decision, moreover, introduces considerable uncertainty into this area of law. Its cramped view of what constitutes "an organ" improperly strips foreign states of their right to a federal forum. Throughout the territory of the Ninth Circuit, foreign sovereigns now risk losing the benefits of the FSIA unless they conform the characteristics of their commercial enterprises to the peculiar test the Ninth Circuit has now articulated.

Foreign sovereigns often participate in commerce in the United States through indirect instrumentalities. The uncertainty created by this decision discourages interstate and foreign trade by those entities and increases the risks involved in, and thus the costs of, any trading that does occur. Reliant continues to trade regularly with entities that should rightly be considered organs under the FSIA, including Canadian entities such as Powerex and Hydro-Quebec. During the period from January 1, 2004 through

July 26, 2005, for example, Reliant entered into over 1,000 separate power purchase or sale transactions with Powerex alone. Reliant sold over 66,000 megawatt hours of electric energy to Powerex, while purchasing over 500,000 megawatt hours, with a notional value of nearly $30.5 million. Although the value of these transactions is itself significant, they represent a relatively small portion of the total power trades in which Powerex is a party.

This Court should grant the petition for a writ of certiorari to ensure that the approach to foreign sovereigns set forth in the FSIA is uniformly followed in the federal courts. Foreign sovereign entities must be secure in their rights with respect to potential litigation in the United States so that they will be willing to continue to conduct business in and provide critical resources to United States markets. Reliant and other domestic companies engaged in trade with entities created by foreign sovereigns also benefit from the certain and predictable application of the FSIA. The Ninth Circuit's decision here creates uncertainty and undermines the goal of foreign participation in United States markets.[3]

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[3] The Ninth Circuit correctly rejected plaintiffs' contention that 28 U.S.C. § 1447(d) deprived that court of jurisdiction. Pet. App. 9a-10a. Section 1447(d) states that an "order remanding a case to the State court from which it is removed is not reviewable on appeal or otherwise * * * ." In *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 345 (1976), this Court held that Section 1447(d) "must be construed together" with Section 1447(c), which specifies when certain remands are permitted ("on the basis of any defect other than lack of subject matter jurisdiction" on motion filed within 30 days, and "at any time before final judgment" if "it appears that the district court lacks subject matter jurisdiction"). Reading Section 1447(c) and (d) "*in pari materia*," *Thermtron* held that "*only* remand orders issued under § 1447(c) and invoking the specified grounds therein—that removal was improvident" or that the district court was "without jurisdiction"—are immune from review under § 1447(d). *Thermtron*, 423 U.S. at 346. Accord, *Things Remem-*

CONCLUSION

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

---

bered, Inc. v. *Petrarca*, 516 U.S. 124, 127 (1995) (Section "1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)."); *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 711-712 (1996) (same). Here, as in *Thermtron*, Section 1447(d) does not preclude appellate review because the district court did *not* remand based on grounds set forth in Section 1447(c). Removal did not suffer from procedural defects; it is undisputed that (at a minimum) BC Hydro was statutorily entitled to remove the *entire* case—including all defendants—under 28 U.S.C. 1441(d), while the Bonneville Power Administration and Western Power Administration were entitled to do so under 28 U.S.C. § 1442. Nor did the district court "lack jurisdiction." It simply remanded what was left of the case once it resolved the federal issues. See *Kircher* v. *Putnam Funds Trust*, 373 F.3d 847, 850-851 (7th Cir. 2004). This Court has reviewed an analogous remand decision, *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343 (1988) (reviewing decision remanding pendent state claims under *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), after resolution of federal issues), and the federal courts regularly hold that such remands fall outside § 1447(c), (d), and are reviewable as a result, see *Bogle* v. *Phillips Petroleum Co.*, 24 F.3d 758, 761 (5th Cir. 1994); *In re Prairie Island Dakota Sioux*, 21 F.3d 302, 304 (8th Cir. 1994) (*per curiam*).

RESPECTFULLY SUBMITTED.

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AUGUST 8, 2005

APPENDIX

STATUTORY APPENDIX

1. Section 1441 of Title 28 of the United States Code provides in relevant part:

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations

of section 1446(b) of this chapter may be enlarged at any time for cause shown.

* * * * *

2. Section 1447 of Title 28 of the United States Code provides in relevant part:

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter

jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

3. The Foreign Sovereign Immunities Act (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (28 U.S.C. 1330, 1602, *et seq.*), provides in relevant part:

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

* * * * *

Supreme Court, U.S.
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No. 05-85

IN THE

Supreme Court of the United States

POWEREX CORP.,
Petitioner,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF PLAINTIFFS AND RESPONDENTS IN OPPOSITION TO THE PETITION

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Pursuant to Supreme Court Rule 15.8, Plaintiffs and Respondents[1] (collectively, "Plaintiffs") respectfully submit this supplemental brief in opposition to the Petition for a Writ of Certiorari (the "Petition") filed by Powerex Corp. ("Petitioner"), to apprise the Court of subsequent developments.

In its reply brief, dated December 20, 2005, Petitioner contends that the Petition is not moot, *inter alia*, because the Federal Energy Regulatory Commission ("FERC") has not yet approved the settlement between the Reliant entities and Plaintiffs. FERC approved the settlement on December 22, 2005. *See* http://www.ferc.gov/EventCalendar/Files/20051222170706-EL00-95-000.pdf (no publication citation is yet available).

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[1] Plaintiffs and Respondents are: People of the State of California *ex rel.* Dennis J. Herrera and John A. Russo; City and County of San Francisco; City of Oakland; County of Santa Clara; Valley Center Municipal Water District; Padre Dam Municipal Water District; Ramona Municipal Water District; Helix Water District; Vista Irrigation District; Yuima Municipal Water District; Fallbrook Public Utility District; Borrego Water District; Metropolitan Transit Development Board; San Diego Trolley, Inc.; San Diego Transit Corporation; Sweetwater Authority; Pamela R. Gordon; Ruth Hendricks; Oscar's Photo Lab; Mary L. Davis; Cruz Bustamante; and Barbara Mathews.

RESPECTFULLY SUBMITTED,

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RELIANT ENERGY SERVICES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether petitioner, which is wholly owned by a crown corporation that is itself wholly owned by the Canadian Province of British Columbia, and which performs obligations and exercises rights of the Province pursuant to treaties with the United States, is entitled to the protections of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, as an "organ of a foreign state or political subdivision thereof," 28 U.S.C. 1603(b)(2).

2. Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. 1447(d).

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INTEREST OF THE UNITED STATES

The United States has an interest in the proper interpretation of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, and in the proper procedures to be followed when federal agencies and foreign sovereigns remove a case to federal court. In response to the Court's invitation, the Solicitor General filed a brief at the petition stage expressing the views of the United States.

STATEMENT

1. The FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The FSIA defines "foreign state" to include "an agency or instrumentality of a foreign state," 28 U.S.C. 1603(a), which, in turn, is defined to mean:

> any entity—(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. 1603(b). The FSIA "guarantees foreign states the right to remove any civil action from a state court to a federal court," *Verlinden*, 461 U.S. at 489, and that, "[u]pon removal[,] the action shall be tried by the court without jury," 28 U.S.C. 1441(d). Those rights exist whether or not the foreign state is immune from suit in the particular case, and they extend to agencies and instrumentalities of a foreign state as well as the foreign state itself. *Ibid.*; 28 U.S.C. 1603(a).

2. Petitioner is a corporation organized under the laws of the Province of British Columbia, a political subdivision of Canada. Petitioner is wholly owned by the British Columbia Power and Hydro Authority (BC Hydro), a provincial crown corporation that is in turn wholly owned by the Province. Pet. App. 53a, 58a. BC Hydro, by law, "is for all its purposes an agent of the government and its powers may be exercised only as an agent of the government." *Id.* at 166a. The directors of BC Hydro are appointed by the Lieutenant Governor in Council and hold office during pleasure, and the exercise of the board of directors' powers is subject to the approval of the Lieutenant Governor in Council. *Id.* at 166a-167a.

BC Hydro's responsibilities include the construction of dams, storage facilities, and reservoirs, and the generation, transmission, and distribution of electricity. Pet. App. 32a, 167a-168a. BC Hydro is also responsible for implementing on behalf of Canada the Columbia River Treaty between the United States and Canada, which is designed to control the flow of the Columbia River for both flood control and power-generation purposes benefitting both nations. *Id.* at 50a-51a.[1] Under the treaty-based management system, Canadian dams sometimes must release more water than would be optimal for their own power-generating purposes, in order to maintain water levels in the United States. *Id.* at 51a. The treaty accordingly provides that the United States will reimburse the Province (as assignee of Canada) for foregone power-generating opportunities. See *id.* at 51a, 55a.

BC Hydro generates more electric power than the Province needs. In 1988, BC Hydro created petitioner, at the direction of the Province, as a wholly owned subsidiary to market BC Hydro's excess power to the United States. See Pet.

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[1] See Treaty Between the United States of America and Canada Relating to Cooperative Development of the Water Resources of the Columbia River Basin, signed Jan. 17, 1961, entered into force Sept. 16, 1964, 15 U.S.T. 1555; Pet. App. 61a-137a.

App. 30a; J.A. 267. The directors of petitioner are appointed by the board of BC Hydro. J.A. 234. A majority of petitioner's directors are members of the BC Hydro board, *ibid.*, and appointment of the single outside member was subject to the concurrence of the Office of the Premier, *ibid.*; Pet. App. 58a-59a. Petitioner's business activities are subject to a risk management policy established and overseen by BC Hydro, and there is close operational coordination between BC Hydro and petitioner to optimize BC Hydro's generating capacity. *Id.* at 28a. Petitioner's income is consolidated with that of BC Hydro, *ibid.*, and a significant portion of those consolidated profits are either transferred to the Province, *id.* at 202a-204a, or taken into account in the rate charged for BC Hydro's power, thereby subsidizing the cost of power to the Province's citizens, see J.A. 206.

After petitioner was created, it worked together with the Province in negotiating agreements regarding Canada's entitlement under the Columbia River Treaty. See Pet. App. 55a. Ultimately, the Province assigned to petitioner its rights under that Treaty. See J.A. 133-159. In addition, petitioner is responsible for providing power to the City of Seattle as required in the Skagit River Treaty between the United States and Canada.[2] See J.A. 190-194.

3. a. Plaintiffs—including the State of California and individual energy consumers—sued cross-plaintiffs (among others) in California state court, seeking damages for alleged manipulation of the electricity market in violation of state law. The latter parties filed cross-complaints against petitioner, BC Hydro, the Bonneville Power Administration (BPA), and Western Area Power Administration (WAPA), alleging that they participated in the manipulation of energy markets.

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[2] See Treaty Between Canada and the United States of America Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pond D'Oreille River, with annex, signed Apr. 2, 1984, entered into force Dec. 14, 1984, T.I.A.S. No. 11,088; Pet. App. 138a-146a.

Petitioner and BC Hydro removed the case to federal district court pursuant to the FSIA, 28 U.S.C. 1441(d). The federal agencies invoked 28 U.S.C. 1442(a)(1) as additional authority for removal. Pet. App. 19a. The plaintiffs moved to remand the case to state court. They argued that the court lacked jurisdiction to adjudicate the claims against BC Hydro and the federal agencies because they were immune from the cross-claims, and that petitioner could not remove under the FSIA because it was not an agency or instrumentality of British Columbia. *Id.* at 20a, 22a, 33a, 38a.

The district court granted the motion to remand. Pet. App. 18a-44a. The court held that, as "a corporation wholly-owned by a political subdivision of a foreign government," BC Hydro qualified as a "foreign state" for purposes of the FSIA, *id.* at 21a (citing 28 U.S.C. 1603(a)), and that the claims against it did not fall within any of the FSIA's exceptions to immunity, see *id.* at 21a-33a. The court also held that BPA and WAPA were immune from suit, *id.* at 40a, and that because the state court lacked jurisdiction over the claims against BPA and WAPA, so did the federal court, because its jurisdiction on removal was derivative of that of the state court, *id.* at 43a-44a. The court concluded, however, that petitioner did not come within the statutory definition of an agency or instrumentality, and therefore did not qualify as a "foreign state" under the FSIA. *Id.* at 33a-38a.

BC Hydro, BPA, and WAPA sought to clarify that the claims against them had been dismissed, but the district court denied their requests. The court reasoned that, because it could not exercise jurisdiction over the claims against those parties, it could not dismiss the claims, and was instead required by 28 U.S.C. 1447(c) to remand the entire action to state court. See J.A. 281-286, 287-289.

b. The cross-plaintiffs, BPA, WAPA, and petitioner each appealed. Pet. App. 8a-9a. The court of appeals first held that 28 U.S.C. 1447(d) did not bar appellate review. The court reasoned that the district court had removal jurisdiction over

the case at the outset because of BC Hydro's status as a foreign state and BPA and WAPA's status as federal agencies. *Id.* at 10a. Because the district court had jurisdiction, and had exercised that jurisdiction to decide the claims of immunity and the status of petitioner, the court of appeals held that it was "not deprived by § 1447(d) of jurisdiction to review these substantive rulings." *Ibid.*

The court then held (on the appeal of the cross-plaintiffs) that BC Hydro, BPA, and WAPA were entitled to immunity. Pet. App. 11a, 14a. It also held (on the appeal of BPA and WAPA) that the district court erred in refusing to dismiss the claims against them because, in a removed action, a defendant's immunity "is vindicated only by the district court's dismissal of the claims." *Id.* at 16a.

With respect to petitioner's appeal, the court of appeals affirmed, holding that petitioner is not an "organ of a foreign state or political subdivision thereof," 28 U.S.C. 1603(b)(2). Pet. App. 14a. The court stated that its determination of organ status would turn ultimately on "whether the entity engages in a public activity on behalf of the foreign government," and that it would "look to the purposes of an entity's activities, the entity's independence from government, the level of financial support received from the government, and the entity's privileges and obligations under the law." *Id.* at 15a (quoting *Patrickson* v. *Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001), aff'd and dismissed in part, 538 U.S. 468 (2003)). The court of appeals observed that petitioner "was not run by government appointees, was not staffed with civil servants, was not wholly owned by the government, was not immune from suit, and did not exercise any regulatory authority." *Id.* at 15a-16a. The court acknowledged that petitioner offered evidence that it "serves a public purpose," but the court concluded that what it regarded as petitioner's "high degree of independence from the government of British Columbia, combined with its lack of financial support from the government and its lack of special privileges or obligations

under Canadian law dictate [the] holding that PowerEx is not an organ of British Columbia." *Id.* at 16a.

SUMMARY OF ARGUMENT

1. The district court recognized that BC Hydro, BPA, and WAPA properly removed this action to federal court in order to vindicate their sovereign immunity from suit. The court nevertheless remanded the case to state court on the ground that, although the defendants properly removed, their immunity prevented the court from actually hearing the claims against them. That is not a proper basis for remand under Section 1447(c), which provides for remand only on the basis of a defect in removal procedure or jurisdiction, not on the basis of developments in federal court after a case was properly removed. More particularly, with respect to this case, Congress specifically provided for removal by foreign states and the United States, as well as their agencies and instrumentalities, in large part to permit questions of immunity to be decided by the federal courts. Plainly, it did not intend an affirmative finding of immunity to be a basis for remanding the immune parties to state court. Because the district court's remand was not for a reason specified in Section 1447(c), review of its order was not barred by Section 1447(d).

2. The court of appeals' mechanical application of the test for whether an entity is an "organ" of a foreign state was flawed. The factors must be applied flexibly in service of, and with constant reference to, the ultimate question: whether the defendant serves a public purpose on behalf of its government. Many of the factors the court found lacking, such as immunity under domestic law, would be significant if they were present because they would be strongly suggestive of a certain type of government entity, but their absence is not significant. Many United States government instrumentalities lack some of the factors the court of appeals emphasized, and the test has to be flexible enough to capture the wide variety of government instrumentalities. Much more signifi-

cant, in this case, are the circumstances of petitioner's creation, its close involvement with BC Hydro—its sole shareholder, and the Province's wholly owned statutory agent—on matters of public interest, and the close financial relationship between petitioner and BC Hydro. Under a proper analysis, it is clear that petitioner qualifies as an "organ" of the Province.

ARGUMENT

I. BECAUSE THE DISTRICT COURT HAD REMOVAL JURISDICTION, ITS SUBSEQUENT REMAND ORDER WAS SUBJECT TO APPELLATE REVIEW

The district court plainly had subject-matter jurisdiction at the time of removal, and it properly proceeded to resolve numerous questions of federal law in the exercise of that jurisdiction. The district court's erroneous decision, after holding several of the defendants immune from the claims against them, to remand the entire case to the state court was subject to review by the court of appeals. The language and history of 28 U.S.C. 1447(d), and this Court's decisions construing that provision, make clear that a district court's order remanding a case that was properly removed at the outset is not subject to Section 1447(d)'s bar on appellate review.

A. Section 1447(d) Does Not Preclude Appellate Review Of An Order Remanding A Properly Removed Case On The Basis Of The District Court's Post-Removal Rulings

1. This Court has made clear that Section 1447(d) must be read in *pari materia* with 28 U.S.C. 1447(c). See *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 343 (1976). "[O]nly remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 127 (1995). See *Kircher* v. *Putnam Funds Trust*, 126 S. Ct. 2145, 2153 (2006) (same). Thus, this Court has upheld appellate review of remand or-

ders based on: a district court's decision to overturn the Attorney General's certification that a federal employee was acting within the scope of his employment and thus immune from suit, *Osborn* v. *Haley*, 127 S. Ct. 881, 893-896 (2007); a district court's crowded docket, *Thermtron*, 423 U.S. at 340-341; abstention, *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 710-712 (1996); and the discretionary remand of state law claims after the federal law claims that had supported removal were eliminated from the case, *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 348, 355 n.11 (1988). Each of those cases was properly removed to federal district court. The district court therefore was properly vested with jurisdiction from the outset, and the purported ground for the remand was not one encompassed within Section 1447(c) or, therefore, by the bar to appellate review in Section 1447(d).

One ground for remand provided in Section 1447(c) is lack of subject matter jurisdiction. But that reference must be understood, and has been understood by all but one of the courts of appeals to address the issue, as limited to remand orders based on a defect in subject matter jurisdiction *at the time of removal* that rendered the *removal itself* jurisdictionally improper.[3] That reading is consistent with the general rule that a federal court's subject matter jurisdiction is fixed at the time the suit is brought and is not defeated by subsequent events. See, *e.g.*, *Osborn*, 127 S. Ct. at 896; *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 541 U.S. 567, 574 (2004); *Freeport-McMoRan, Inc.* v. *KN Energy, Inc.*, 498 U.S.

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[3] See, *e.g.*, *Reddam* v. *KPMG LLP*, 457 F.3d 1054, 1058 (9th Cir. 2006); *Letherer* v. *Alger Group, L.L.C.*, 328 F.3d 262, 265 (6th Cir. 2003); *Poore* v. *American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1290-1291 (11th Cir. 2000); *Transit Cas. Co.* v. *Certain Underwriters at Lloyd's*, 119 F.3d 619, 623 (8th Cir. 1997), cert. denied, 522 U.S. 1075 (1998); *Trans Penn Wax Corp.* v. *McCandless*, 50 F.3d 217, 223 (3d Cir. 1995); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708-709 (7th Cir. 1992). But see *Linton* v. *Airbus Industrie*, 30 F.3d 592, 599-600 (5th Cir.), cert. denied, 513 U.S. 1044 (1994).

426 (1991); *Cohill*, 484 U.S. at 350-351; *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 294 (1938).

2. That reading is also consistent with the historical development of Section 1447(c). Before 1988, the text of Section 1447(c) made explicit that it authorized remand only based on defects at the time of removal. It mandated remand "[i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction." 28 U.S.C. 1447(c) (1982). In *Thermtron*, the Court recognized that "only remand orders" issued on the ground that "removal was improvident and without jurisdiction[] are immune from review." 423 U.S. at 346. Thus, under the pre-1988 version, it was clear that an order remanding a properly removed case based on post-removal developments, such as the dismissal of the federal claims on which removal was based, was not a remand order under Section 1447(c) and was therefore not immune from review under Section 1447(d). See, *e.g.*, *Cohill*, 484 U.S. at 348; *Kunzi* v. *Pan-Am*, 833 F.2d 1291, 1295 (9th Cir. 1987) (where district court found removal jurisdiction proper, case "could not have been removed 'improvidently and without jurisdiction,' and thus the remand[] could not have been based on section 1447(c)").

That rule was not altered by later amendments to Section 1447(c), which established different time limitations for remands based on two types of defects in removal—a defect in removal procedure and a defect in removal relating to subject matter jurisdiction. In 1988, Congress amended Section 1447(c), Pub. L. No. 100-702, § 1016(c)(1), 102 Stat. 4670, to require a party to file "[a] motion to remand the case on the basis of any defect in removal procedure * * * within 30 days" or forfeit the objection. 28 U.S.C. 1447(c) (1988). The House Report explained that "[s]o long as the defect in removal procedure does not involve a lack of federal subject matter jurisdiction," there is no reason the case should be sent back to state court long after the fact. H.R. Rep. No. 889, 100th Cong., 2d Sess. Pt. 1, at 72 (1988). In contrast, with regard to

a "defect" that *did* "involve a lack of federal subject matter jurisdiction," *ibid.*, the amended statute required remand "at any time before final judgment," 28 U.S.C. 1447(c) (1988).[4]

In 1996, the provision was again amended, Pub. L. No. 104-219, § 1, 110 Stat. 3022, to clarify that waivable objections to removal include "any defect other than lack of subject matter jurisdiction." 28 U.S.C. 1447(c) (Supp. II 1996). The reference to "any defect"—like the similar reference in the 1988 House Report—makes clear that the phrase "lack of subject matter jurisdiction" means a non-waivable jurisdictional "defect" in the removal itself. *Ibid.*; see H.R. Rep. No. 799, 104th Cong., 2d Sess. 1 (1996) ("30-day limit applies to any 'defect' other than the lack of subject matter jurisdiction").

The foregoing history demonstrates that Congress did not intend to broaden the class of unreviewable remand orders, but rather sought only to ensure that plaintiffs promptly raise any objection to the removal on *non*-jurisdictional grounds. See H.R. Rep. No. 889, at 72. As under *Thermtron*, "the proper inquiry is still whether the court had jurisdiction at the time of removal." *Poore*, 218 F.3d at 1290; see n.3, *supra*.

3. There are, moreover, sound reasons why Congress would not bar appellate review of decisions rendered by the district court in the exercise of acknowledged jurisdiction. Section 1447(c) is an "antishuttling provision[]." *Osborn*, 127 S. Ct. at 895. "Ordinarily, when the plaintiff moves to remand a removed case for lack of subject matter jurisdiction, the federal district court undertakes a *threshold* inquiry; typically

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[4] The House Report makes clear that Congress understood a mandatory (and therefore unreviewable) remand for lack of subject matter jurisdiction at the time of removal to be distinct from a remand in a properly removed case after the court had resolved disputed federal questions, which was discretionary. See H.R. Rep. No. 889, at 72 (emphasizing that "[t]he amendment is written in terms of a defect in 'removal procedure' in order to avoid any implication that remand is unavailable after disposition of all federal questions leaves only State law questions that might be decided as a matter of ancillary or pendent jurisdiction or that instead might be remanded").

the court determines whether complete diversity exists or whether the complaint raises a federal question." *Ibid.* (emphasis added). Such "threshold" jurisdictional questions, which determine whether the case was properly removed in the first place, should, and most often will, be decided at the outset. Section 1447(d) embodies Congress's judgment that little would be gained, and much lost, from protracted appellate litigation about whether such threshold determinations were correct. See *Kircher* v. *Putnam Funds Trust*, 126 S. Ct. 2145, 2152 (2006).

Those considerations are quite different where, as here, the district court unquestionably possessed jurisdiction over the removed case from the outset and proceeded to adjudicate rights of the parties under federal law. At that point, considerations of efficiency may weigh against transfer of the case back to state court, which would be "perfectly free to reject the remanding court's" federal rulings. *Kircher*, 126 S. Ct. at 2157. That is particularly true in a case like this, when the district court remanded only after making rulings on federal issues that confirmed that a federal forum was appropriate. Assuring access to the federal judicial system for resolution of such questions is the reason that Congress provided for removal in the first place. See *Thermtron*, 423 U.S. at 344 (comparing remand of "an otherwise properly removed action" to dismissal and referral to state court of "an action properly filed in the federal court in the first instance").

B. Because This Case Was Properly Removed, The Court Of Appeals Had Jurisdiction To Review The District Court's Rulings In The Exercise Of That Jurisdiction

1. In this case, the district court stressed that no party contested that the actions could be removed pursuant to 28 U.S.C. 1441 and 1442. See Pet. App. 20a. As federal agencies, BPA and WAPA were entitled to remove the action pursuant to 28 U.S.C. 1442(a)(1) and have their amenability to suit adjudicated by the federal district court, which they did. See

Pet. App. 7a, 39a-40a. Similarly, as a crown corporation wholly owned by the Province of British Columbia, BC Hydro unquestionably qualifies as an agency or instrumentality of Canada and therefore as a foreign state under 28 U.S.C. 1603(a) and (b). Pet. App. 12a-14a, 21a. Therefore, BC Hydro had the right to remove the action under 28 U.S.C. 1441(d) in order to have its claim of immunity decided by the federal court, which claim the court upheld. Pet. App. 21a-33a.

Because removal by BC Hydro, BPA, and WAPA was proper, the district court had (and retained) subject-matter jurisdiction over the entire case irrespective of the "foreign state" status of petitioner. Remand therefore was not required by 28 U.S.C. 1447(c). See, *e.g.*, *Nolan* v. *Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), cert. denied, 499 U.S. 962 (1991); see also H.R. Rep. No. 1487, 94th Cong., 2d Sess. 32. (1976). It follows that the bar to appellate review in Section 1447(d)—which applies only to "remand orders issued under § 1447(c) and invoking the [mandatory] grounds specified therein," *Osborn*, 127 S. Ct. at 893 (quoting *Thermtron*, 423 U.S. at 346) (brackets added in *Osborn*)—does not apply to a district court order remanding a case after it resolved certain questions of federal law properly brought before it.[5]

2. The district court made no reference to Section 1447(c) in its initial remand order. The court did, however, invoke

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[5] In holding that appellate review of the remand order was not barred in *Osborn*, the Court relied on the specification in 28 U.S.C. 2679(d)(2) that the Attorney General's certification that the defendant federal employee was acting within the scope of his employment "shall conclusively establish scope of office or employment for purposes of removal." The Court concluded that that "anti-shuttling" provision must be given precedence over 28 U.S.C. 1447(d). The Attorney General's certification is the threshold jurisdictional predicate for removal under 28 U.S.C. 2679(d)(2). The specification that his certification is conclusive "for purposes of removal" thus serves to foreclose any contention that remand is required by Section 1447(c) if the district court overturns that certification. Here, because removal jurisdiction was unquestionably proper from the outset, the absence of a provision like Section 2679(d)(2) is irrelevant.

that provision in subsequent orders that, *inter alia*, denied motions by BC Hydro, BPA, and WAPA to clarify that the claims against them had been *dismissed* on immunity grounds. J.A. 283, 288. The district court's belated invocation of Section 1447(c), and its statement that the case was "remanded for lack of subject matter jurisdiction," J.A. 283-284, are not dispositive. A court's characterization of its action is not binding on this Court either to confer or to deny appellate jurisdiction. See, *e.g.*, *United States* v. *Jorn*, 400 U.S. 470, 478 n.7 (1971) (plurality opinion of Harlan, J.) (trial court's characterization of its action as "acquittal" did not deprive Court of appellate jurisdiction); *Oliver Am. Trading Co.* v. *Mexico*, 264 U.S. 440, 442 (1924) (district court's characterization of dismissal of Mexico on grounds of immunity as a "jurisdictional question" did not bar this Court from "determining for itself whether the question which was certified is in truth one of the jurisdiction of the lower court as a federal court"); *Things Remembered*, 516 U.S. at 134 (Ginsburg, J., concurring). Allowing a district court's mischaracterization of its decision as "jurisdictional" to defeat appellate jurisdiction is particularly problematic in light of the oft-remarked confusion surrounding that term. See *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 90 (1998) ("Jurisdiction is a word of many, too many, meanings.").

In this case, it is evident from the district court's own orders that its reference to "lack of subject matter jurisdiction" was not a finding that it lacked *removal* jurisdiction. To the contrary, the court drew a clear distinction between the question "whether the actions were properly removed in the first instance," which was not contested, and the question whether the court had "jurisdictional authority to hear the removed claims," because of the defendants' immunity. Pet. App. 20a. Thus, the court noted that "[n]one of the parties contend that the cross-[defendants] could not remove these actions under the provisions of 28 U.S.C. §§ 1441 and 1442." *Ibid.* "*Rather*," the court continued, "[p]laintiffs argue that the

Court lacks jurisdiction over the removed actions and, as such, they must be remanded." *Ibid.* (emphasis added). The court stressed that "[t]he issue hinges, then, on the Court's jurisdictional authority *to hear* the removed claims, *not* whether the actions were *properly removed in the first instance*." *Ibid.* (emphases added).

Those questions are, indeed, distinct. Unlike the federal courts' original subject matter jurisdiction over foreign states under Section 1330, which exists only if an exception to the foreign state's immunity applies, removal jurisdiction under Section 1441(d) exists over "*[a]ny* civil action brought in a State court against a foreign state as defined in section 1603(a)" (emphasis added). If, in a case properly removed under this provision, the district court concludes that the foreign state is immune, the proper response is to dismiss the claims against it. That would be the point of a federal immunity. Likewise, as the court of appeals held (Pet. App. 16a-17a), when a suit against the United States or an agency, such as BPA and WAPA, that is not subject to suit in state court is removed under 28 U.S.C. 1442, "the proper course for a federal district court to take after removal would be to *dismiss the case altogether*, without reaching the merits." *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.27 (1983) (emphasis added).

Thus, a holding that a defendant that properly removed a case to federal court under one of those provisions is immune from the claims against it is not a finding that the court lacked *removal* jurisdiction. It therefore is neither a determination of a "lack of subject matter jurisdiction" for purposes of Section 1447(c), nor an order within the bar to appellate review in Section 1447(d). To the contrary, it is a ruling that accentuates the need for a federal forum, which is provided to ensure that the federal-law immunity is fully protected. The district court's invocation of Section 1447(c) cannot shield a remand order on that mistaken ground from appellate review. See *Thermtron*, 423 U.S. at 350-352 (Section 1447(d) does not bar

review of question whether remand was of the type authorized by Section 1447(c)).

In Sections 1442(a) and 1441(d), "Congress has expressly provided by statute for removal [because] it desired federal courts to adjudicate defenses based on federal immunities" for the federal government and its agencies and officers, and for foreign states and their agencies and instrumentalities. *Oklahoma Tax Comm'n* v. *Graham*, 489 U.S. 838, 841-842 (1989); see S. Rep. No. 366, 104th Cong., 2d Sess. 30-31 (1996) (Section 1442(a)(1) reflects "Congress' intent that questions concerning * * * the scope of Federal immunity * * * be adjudicated in Federal court"); H.R. Rep. No. 1487, at 32 (FSIA's removal provision reflects "the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area"). It would be absurd to think that Congress, which provided both immunity from suit *and* a right of removal to federal court to vindicate that immunity, would have intended to shield from appellate review an order like that of the district court here holding that, *because* the defendants have a federal immunity from suit, the claims against them must be remanded to state court. Nothing in the text, history, or purposes of Section 1447(c) and (d) requires that absurd result.[6]

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[6] Even if Section 1447(d) did preclude review of the remand order itself, it would not bar appeal of the separate aspect of the court's order denying the motions of BC Hydro, BPA, and WAPA to dismiss the claims against them, which can be reversed even if the case is to be remanded. See *Osborn*, 127 S. Ct. at 902 (Souter, J., concurring and dissenting in part) (citing *City of Waco* v. *United States Fid. & Guar. Co.*, 293 U.S. 140 (1934)). Here, for example, the court of appeals correctly upheld its appellate jurisdiction over the district court's order denying BPA and WAPA's motions to dismiss on immunity grounds. Pet. App. 16a-17a. Because no party has sought review of that aspect of the court of appeals' judgment, it is not before the Court.

We agree with petitioner (Br. 40-41, 48-50) that, even apart from the district court's uncontested removal jurisdiction based on the removals by BC Hydro, BPA, and WAPA, there are strong arguments that the remand order denying petitioner's claim to foreign state status and the right under the FSIA to a

II. PETITIONER IS AN AGENCY OR INSTRUMENTALITY OF THE PROVINCE FOR PURPOSES OF THE FSIA

A. In The FSIA, Congress Restricted The Scope Of Foreign State Immunity While Expanding The Class Of Entities That Could Invoke The Act's Procedural Benefits

1. Until 1952, the United States adhered to the "absolute" theory of foreign sovereign immunity, *Verlinden*, 461 U.S. at 486, under which "foreign sovereigns and their public property [we]re * * * not * * * amenable to suit in our courts without their consent," *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 134 (1938). In 1952, the Department of State announced the adoption of the "restrictive" theory of foreign sovereign immunity. See Letter from Jack B. Tate, Acting Legal Adviser, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952) (Tate Letter) *in Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711-715 (1976). The Tate Letter stated that thenceforth the Department would recommend that foreign states be granted immunity only for their sovereign or public acts (*jure imperii*), and not for their commercial acts (*jure gestionis*). *Id.* at 711. See *Verlinden*, 461 U.S. at 486-487. The United States adopted the restrictive theory in light of the growing acceptance of that theory among for-

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federal forum and bench trial is subject to appellate review in the federal courts. *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 n.8 (1985) ("we have held that state-court decisions rejecting a party's federal-law claim that he is not subject to suit before a particular tribunal are 'final' for purposes of our certiorari jurisdiction under 28 U.S.C. § 1257"); cf. *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 511 (1959) (right to interlocutory mandamus relief for denial of jury trial "is settled"). The right to a non-jury trial is an important aspect of foreign sovereigns' immunity from suit. Cf. *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981) (holding the United States' immunity from a jury trial must be separately and expressly waived). Further, that right would be irretrievably lost in the event of a remand, because the right to a bench trial applies only in the federal forum. See 28 U.S.C. 1330, 1441(d).

eign nations and the need for a judicial forum to resolve disputes stemming from the "widespread and increasing practice on the part of governments of engaging in commercial activities." Tate Letter (*Alfred Dunhill*, 425 U.S. at 714).

In 1976, Congress enacted the FSIA to establish a "comprehensive scheme" governing the manner by which "foreign sovereigns may be held liable in a court in the United States," *Verlinden*, 461 U.S. at 496-497. The FSIA provides rules ranging from the manner of serving process, 28 U.S.C. 1608(a), (b) and (c), to the execution of judgments, 28 U.S.C. 1609-1611. As a general matter, the FSIA codifies the "restrictive theory" of sovereign immunity, allowing foreign states to be sued for their "commercial activities." *Verlinden*, 461 U.S. at 487-488. Even where the FSIA denies immunity, the Act guarantees foreign states the right to remove a civil action from state to federal court and the right to a bench, rather than jury, trial in federal court. *Id.* at 489 (citation omitted); 28 U.S.C. 1330(a), 1441(d).

2. During the time when the United States adhered to a policy of "absolute" immunity for foreign states, a significant practical limitation on that doctrine was the courts' refusal to extend immunity to separate legal entities owned by foreign governments. Following this Court's rule with respect to domestic government corporations, many courts held that "[a] suit against a corporation is not a suit against a government merely because it has been incorporated by direction of the government, and is used as a governmental agent, and its stock is owned solely by the government." *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 202 (S.D.N.Y. 1929) (citing *Sloan Shipyards Corp.* v. *U.S. Shipping Bd. Emergency Fleet Corp.*, 258 U.S. 549 (1922)). See *Coale* v. *Societe Coop. Suisse de Charbons*, 21 F.2d 180 (S.D.N.Y. 1921) (A. Hand, J.).

Some commentators characterized the separate entity rule as applied to foreign sovereigns as a "judicial effort[] to restrict the applicability of the absolute theory." Comment, *The*

Jurisdictional Immunity of Foreign Sovereigns, 63 Yale L.J. 1148, 1154 (1954). The effort was criticized as "unsatisfactory" because it failed to focus on more substantial policy concerns, such as whether the entity's actions were undertaken in a sovereign capacity. *Id.* at 1153-1154. See Bernard Fensterwald, Jr., *Sovereign Immunity and Soviet State Trading*, 63 Harv. L. Rev. 614, 619 (1950) (criticizing rule as "a makeweight used to avoid application of the generally undesirable doctrine of absolute immunity").

The United States' adoption of the restrictive theory of immunity created an opportunity for the courts to refine the separate entity rule. Just as with foreign sovereigns themselves, courts could hold their separate corporate entities subject to suit when engaging in commercial activity, but not when engaged in activity of a sovereign nature. In practice, however, there was "chaos" among the lower courts concerning separate entities. William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tul. L. Rev. 535, 548 (1991). There were several approaches a court might employ: continue to apply "the classic separate entity rule"; infer a waiver of the entity's immunity if "the corporate charter contained a 'sue and be sued' clause"; or apply the restrictive theory to corporate entities, with some courts "looking to the 'purpose' of the activity" and others "to the 'nature' of the activity." *Id.* at 550 n.77. Some courts "analogized to the doctrine of disregard of the corporate form," but diverged significantly from traditional corporate law. *Id.* at 548 & n.71.

When Congress enacted the FSIA, it rejected the either/or dichotomy of the traditional separate entity rule in favor of a considerably more calibrated approach. While Congress limited foreign states' immunity in keeping with the restrictive theory, it extended the Act's protections to foreign states' agencies and instrumentalities, see 28 U.S.C. 1603(b). Congress thus rejected the analogy of piercing the corporate veil.

See *Dole Food*, 538 U.S. at 474-476. Rather, it crafted a calibrated set of rules that afford immunity and procedural safeguards to agencies and instrumentalities that are in some ways more limited than those afforded foreign states proper. See, *e.g.*, 28 U.S.C. 1605(a)(3) (less immunity from expropriation claims), 1606 (limiting punitive damages against foreign state but not instrumentality), 1608(b) (less restrictive service of process rules for instrumentalities), 1610(b) (broader rights to execute judgments against property of instrumentalities). But the important rights to remove a suit to federal court and to a non-jury trial in federal court were extended to an "agency or instrumentality of a foreign state." H.R. Rep. No. 1487, at 32. Congress viewed such protections, even for a commercial agency or instrumentality, as necessary "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area." *Ibid.*

3. By providing that foreign state agencies and instrumentalities will generally be subject to suit for their commercial activities, but guarantying certain procedural protections, Congress approximated the treatment accorded agencies and instrumentalities of the federal government. The long-standing practice with respect to government-owned corporations is that they are subject to suit, see *Keifer & Keifer* v. *RFC.*, 306 U.S. 381, 390-391 (1939), but are nonetheless routinely recognized as agencies or instrumentalities of the government for other purposes, including the right to remove a suit to federal court. See, *e.g.*, *American Nat'l Red Cross* v. *S.G.*, 505 U.S. 247, 249, 257 (1992) (Red Cross entitled to remove state suit); *FSLIC* v. *Ticktin*, 490 U.S. 82, 85-86 (1989) (28 U.S.C. 1345 provides jurisdiction over suit brought by FSLIC); *Department of Employment* v. *United States*, 385 U.S. 355 (1966) (Red Cross immune from state taxation); *Cherry Cotton Mills, Inc.* v. *United States*, 327 U.S. 536, 539 (1946) (claims of RFC could be asserted as counterclaims of the United States); *Inland Waterways Corp.* v. *Young*, 309 U.S.

517, 522-524 (1940); *Emergency Fleet Corp.* v. *Western Union Tel. Co.*, 275 U.S. 415, 420-421 (1928).

B. Congress Intended The Definition Of Agency Or Instrumentality To Be Flexible And Inclusive

1. Congress recognized that there are many ways in which foreign governments may organize functions carried out on their behalf, and it made certain that the FSIA would be flexible enough to accommodate that variety. Thus, in extending the protections of the FSIA to an "agency or instrumentality" of a foreign state, 28 U.S.C. 1603(a), Congress provided that entities could qualify several ways. Specifically, a "separate legal person, corporate or otherwise," qualifies as an "agency or instrumentality" if it is either "an organ of a foreign state or political subdivision thereof," or "a majority of [its] shares or other ownership interest is owned by a foreign state or a political subdivision thereof." 28 U.S.C. 1603(a) and (b).

The majority ownership prong of the definition establishes a categorical rule of inclusion. See *Dole Food*, 538 U.S. at 474 (construing that categorical protection to require direct ownership by the foreign state or political subdivision). Thus, Congress provided that, even "[w]here ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality" as long as "a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision." H.R. Rep. No. 1487, at 15. There is no inquiry into the entity's purpose or function—it is treated as a sovereign based solely on majority ownership.

The other prong of the definition is intended to allow qualification regardless of the entity's particular form of organization or control, based upon a more functional analysis. See H.R. Rep. No. 1487, at 15-16 (recognizing that an agency or instrumentality "could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel com-

pany, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name"). "A flexible approach is particularly appropriate after *Dole*, inasmuch as courts likely now will be asked to evaluate the possible organ status of a wide variety of entities controlled by foreign states through tiering arrangements and because of the widely differing forms of ownership or control foreign states may exert over entities." *USX Corp.* v. *Adriatic Ins. Co.*, 345 F.3d 190, 208 (3d Cir. 2003), cert. denied, 541 U.S. 903 (2004).

2. In determining whether an entity qualifies as an organ under Section 1603(b), the courts of appeals consider multiple factors including, *inter alia*, the circumstances of the entity's creation, its purpose, the involvement of the state in its affairs, any financial support or grant of exclusive economic rights from the state, its privileges and obligations under local law, and its employment practices. See Pet. App. 15a; *Filler* v. *Hanvit Bank*, 378 F.3d 213, 217 (2d Cir.), cert. denied, 543 U.S. 1022 (2004); *USX*, 345 F.3d at 209; *Patrickson*, 251 F.3d at 807;[7] *Kelly* v. *Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-847 (5th Cir.), cert. denied, 531 U.S. 979 (2000).

The listed factors certainly can be relevant in determining whether an entity is an "organ" of a foreign state. But, as the Fifth Circuit has emphasized, a court should "*not* apply [the factors] mechanically." *Kelly*, 213 F.3d at 847; see also *USX*, 345 F.3d at 208. Instead, they should be consulted with constant reference to the ultimate question: whether the defendant is "an entity that engages in activity serving a national interest and does so on behalf of its national government." *Id.* at 209. The weight of any particular factor in a given case depends on the extent to which it informs that ultimate test.

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[7] In *Patrickson*, the Ninth Circuit held that the foreign entity there was neither an organ of nor majority-owned by a foreign state or political subdivision. This Court considered only the question of majority ownership.

See *id.* at 214 ("[w]eighing the[] factors qualitiatively as well as quantitatively").

C. Petitioner Is An Organ Of British Columbia Because It Serves A Public Purpose On Behalf Of The Province

1. Petitioner is an organ of British Columbia in light of the circumstances and purposes surrounding its creation and its ongoing activities in relation to public resources in the Province and Canada's rights and obligations under international agreements. Petitioner was created at the specific direction of the Cabinet of the Province, which decided, after debates in the Provincial legislative assembly, J.A. 197-202, to "provide a single window agency to be responsible to market the export of power outside the province," J.A. 267. The government's decision was communicated, through the Minister of Mines and Petroleum Resources, to BC Hydro, a crown corporation wholly owned by the Province, with the direction to "incorporate the Export Agency" as a "wholly owned subsidiary of B.C. Hydro." *Ibid.* It is commonly recognized that state agencies and instrumentalities frequently manage the export of natural resources in furtherance of governmental interests. See H.R. Rep. No. 1487, at 15-16 ("state trading corporation" and "export association" are examples of agencies or instrumentalities); *USX*, 345 F.3d at 210 (noting that the exploitation and distribution of public resources is a "government purpose" that "would weigh * * * heavily in favor of organ status") (citing *Kelly*, 213 F.3d at 848, and *Corporacion Mexicana de Servicios Meritimos, S.A. de C.V.* v. *M/T Respect*, 89 F.3d 650, 654-655 (9th Cir. 1996)).

Petitioner furthers another quintessential governmental interest: Canada and the Province have assigned to petitioner the right to market Canada's entitlement to power generated by BPA pursuant to the Columbia River Treaty and the responsibility of providing power to the City of Seattle as required by the Skagit River Treaty. See Pet. App. 55a, 56a-57a; cf. *Department of Employment*, 385 U.S. at 359 (noting,

as supporting American Red Cross's status as government instrumentality, that the government had "devolved upon the Red Cross the right and the obligation to meet this Nation's commitments under various Geneva Conventions"). Petitioner actively participated with the Province in negotiating with the responsible American entities in carrying out the agreements. See Pet. App. 55a.[8]

2. Moreover, it is evident, in light of the close relationship between petitioner and the Province, through BC Hydro, that petitioner engages in its activities for the benefit of the government. BC Hydro by statute "is for all its purposes an agent of the government and its powers may be exercised only as an agent of the government." Pet. App. 166a. Thus, BC Hydro's interactions with petitioner are undertaken on behalf of the government. Those interactions are considerable.

BC Hydro's board, which is appointed by the Provincial Lieutenant Governor, appoints the members of petitioner's board of directors. J.A. 234. A majority of petitioner's board members are also members of the BC Hydro board, *ibid.*, and its one outside member was "subject to concurrence by the Office of the Premier." Pet. App. 59a; J.A. 234.

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[8] The district court erroneously discounted the significance of petitioner's role in marketing the Canadian entitlement under the Columbia River Treaty because a provision of the assignment agreement provides that "Powerex will not be or be construed as *the agent* of the Province." See Pet. App. 36a n.11. It is understandable that the Province, which otherwise has the corporate veil standing between itself and its government-owned corporations, would have made separate provision in connection with the direct assignment of its treaty rights to petitioner to clarify that the Province would not be held liable for petitioner's losses or other wrongs in regard to the assignment, nor subject petitioner to the direct control of the Province. See *First Nat'l City Bank* v. *Banco Para el Comercio Exterior*, 462 U.S. 611, 625 (1983) (noting that "the instrumentality's assets and liabilities must be treated as distinct from those of its sovereign in order to facilitate credit transactions with third parties"). The quoted provision therefore has little independent significance to petitioner's status under the FSIA beyond the fact, which the FSIA presumes, that petitioner is a separate legal entity.

The Province has, moreover, sole beneficial ownership and control of petitioner, albeit through BC Hydro. In such circumstances, the inference that petitioner is an organ of the Province is particularly strong. See *USX*, 345 F.3d at 213 (when a foreign government "has complete control over all shares of [the defendant] albeit through a tiered arrangement," and the subsidiary serves the government's purposes, "this factor weighs in favor of a finding of organ status"). When no private person owns any interest in an entity, then the ultimate fiduciary responsibility is to the state and the state alone.[9] Indeed, the United States regards its own second-tier subsidiaries of wholly owned government corporations to be, like their parents, "wholly owned Government corporation[s]."[10] Moreover, such second-tier government corporations are afforded numerous advantages as agencies or instrumentalities of the government. See, *e.g.*, 12 U.S.C. 84(c)(5) (loans to "any corporation wholly owned directly or indirectly by the United States"), 28 U.S.C. 1733 (admissibil-

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[9] In contrast, in *Dole Food*, Bromine Compounds, Ltd., was three levels removed from the government, and private owners participated at two different levels, thereby reducing the government's ultimate beneficial interest to 66%, and obligating the entity to serve interests other than the government's alone. See J.A. at 93, *Dole Food*, *supra*, No. 01-593, J.A. 93.

[10] See Government Corporation Control Act, ch. 557, § 101, 59 Stat. 597-598 (listing as "wholly owned Government corporation[s]" the Regional Agricultural Credit Corps., Defense Plant Corp., Defense Supplies Corp., Metals Reserve Co., War Damage Corp., RFC Mortgage Co., Petroleum Reserves Corp., Rubber Development Corp., Tennessee Valley Associated Cooperatives, Inc., and FSLIC); *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 388-389 (1995) (noting, with respect to all but the last of these, that they were incorporated by other government owned corporations); *Acron Invs., Inc.* v. *FSLIC*, 363 F.2d 236, 239-240 (9th Cir.) (noting that the FSLIC was, in 1945, a wholly owned subsidiary of the Home Owner's Loan Corporation), cert. denied, 385 U.S. 970 (1966).

ity of copies of records), 2408 (no requirement to post security).[11]

The close relationship between the Province and its wholly owned second-tier subsidiary is demonstrated in several ways. Petitioner's business activities are subject to a risk management policy established by BC Hydro, and there is close coordination between BC Hydro and petitioner to optimize BC Hydro's generating capacity. Pet. App. 28a. Petitioner's net income is reported with BC Hydro's on consolidated income statements, thereby eliminating the financial effect of dealings between the two. J.A. 215, 220; BC Hydro, *Annual Report 2006*, at 83 <http://www.bchydro.com/rx_files/info/info46749.pdf.>. A significant portion of BC Hydro's consolidated profits is either transferred to the Province, *id.* at 202a-204a, or taken into account in the rate charged for BC Hydro's power, with the effect that those profits subsidize the cost of power to the Province's citizens. See J.A. 206.

D. The Court Of Appeals' Analysis Of The Various Factors In Isolation Failed To Appreciate The Extent Of Petitioner's Relationship To BC Hydro And The Province

1. Although the court of appeals made reference to "the ultimate question" of whether petitioner "engages in a public activity on behalf of the foreign government," Pet. App. 15a, it proceeded mechanically, as through a checklist. Its analy-

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[11] As presently worded, Sections 1733 and 2408 confer procedural benefits on any "agency" of the United States, but the Reviser's notes from the 1948 revision of Title 28 confirm that that word encompasses corporations indirectly owned by the United States. See 28 U.S.C. 1733, historical and revision notes (the words "any corporation all the stock of which is beneficially owned by the United States either directly or indirectly" in 28 U.S.C. 661 (1940) "were omitted as covered by 'or agency'"); 28 U.S.C. 2408, historical and revision notes ("Word 'agency' was substituted" for phrase in 28 U.S.C. 870 (1940), "in view of the creation of many independent governmental agencies since the enactment of the original law").

sis, in full, of the factors as they apply to petitioner was as follows:

> [Petitioner] was not run by government appointees, was not staffed with civil servants, was not wholly owned by the government, was not immune from suit, and did not exercise any regulatory authority. *Even though [petitioner] offers some evidence that it serves a public purpose*, its high degree of independence from the government of British Columbia, combined with its lack of financial support from the government and its lack of special privileges or obligations under Canadian law dictate our holding that [petitioner] is not an organ of British Columbia.

Id. at 15a-16a (emphasis added) (citation omitted). In other words, the court of appeals put to one side the substantial evidence that petitioner "serves a public purpose" because it did not conform with or was outnumbered by the other specified factors. The court did not analyze those factors to see what light they shed on whether petitioner serves the public interests of the Province.

2. Furthermore, the factors that the court of appeals considered are not factors of equal weight that can be counted up and scored. Some factors would powerfully suggest agency status if present, but their absence may carry little, if any, significance. One example is whether petitioner is "immune from suit" under Canadian law. Pet. App. 16a. It would be a strong, perhaps even determinative, indication that a foreign state regarded a separate legal entity as its "organ" if the state extended to the entity the sovereign's immunity from suit in its own courts. But, the absence of such immunity cannot, consistent with Congress's intent, be deemed a "factor[] weighing against" that status. *Ibid.* In order to be an organ, "an entity *must* be a separate legal person," *USX*, 345 F.3d at 214; 28 U.S.C. 1603(b), and Congress intended that that requirement could be satisfied by "any * * * entity which, un-

der the law of the foreign state where it was created, *can sue or be sued in its own name*." H.R. Rep. No. 1487, at 15 (emphasis added). See *First Nat'l City Bank* v. *Banco Para el Comercio Exterior*, 462 U.S. 611, 624 (1983) (*Bancec*) (an "instrumentality is typically established as a separate juridical entity, with the power[] * * * to sue and be sued"); *USX*, 345 F.3d at 214 (concluding that whether the defendant "is subject to suit" in its home country "should not be considered [as] part of the organ analysis"). Indeed, treating the absence of immunity as counting against qualification as an organ is inconsistent with Congress's practice of subjecting its own corporate creations to suit while extending them other protections as agencies or instrumentalities of the government. See pp. 19-20, *supra*.

The court of appeals also counted as a factor against petitioner that it was "not wholly owned by the government," Pet. App. 15a-16a, by which it meant that petitioner "is not owned by the Province, but by BC Hydro," *id.* at 16a. That approach, which counts the fact that an entity fails to satisfy the majority-ownership test as a strike against recognizing it as an organ as well, ignores that Congress specifically established the two tests as *alternatives* in order to capture the full "variety of forms" by which a foreign state could organize its agencies or instrumentalities. H.R. Rep. No. 1487, at 15-16. Other arrangements besides the traditional one of direct ownership can also be indicative of a significant relationship between the government and the entity.

The court also counted as a factor against petitioner that it engaged in commercial, rather than regulatory, activities. Pet. App. 16a. However, as the Third Circuit has cautioned, "too heavy a focus on the commercial nature of an entity's activities would tend to confuse the question of the level of protection provided by the FSIA (full immunity or not) with the antecedent question * * * whether the entity comes within the purview of the FSIA at all." *USX*, 345 F.3d at 210. Congress itself recognized that foreign states are especially

likely to create separate legal entities as agencies or instrumentalities of the state to conduct activities that might also be undertaken by private corporations, such as "a mining enterprise, a transport organization such as a shipping line or airline, [or] a steel company." H.R. Rep. No. 1487, at 16.

The fact that petitioner is "not staffed with civil servants," Pet. App. 15a, should also be of little significance. Precisely because the organ prong of the test is a catch-all, it covers a range of entities with widely varying relationships with the state. While an organization staffed entirely with civil servants would mark an entity as particularly likely to qualify, one would not necessarily expect to find civil servants staffing even a wholly owned corporation. The Tennessee Valley Authority, for example, "perhaps the best known of the American public corporations," *Bancec*, 462 U.S. at 625 n.15, does not adhere to the laws regarding public employees, see 16 U.S.C. 831b (board shall appoint officers and employees "without regard to the provisions of Civil Service laws applicable to officers and employees of the United States"). See *Bancec*, 462 U.S. at 624 (instrumentalities are "often" not subject to governmental "personnel requirements"). Moreover, to the extent that there might be any negative inference from the fact that petitioner's employees are not civil servants, it is insignificant in light of those features of petitioner's relationship with the Province and BC Hydro that distinguish it from a purely private corporation. For example, petitioner's employees participate in BC Hydro's retirement plan, J.A. 247-248, and members of petitioner's board of directors are appointed by BC Hydro's board, which is appointed by the Provincial Lieutenant Governor, and outside members of petitioner's board are "subject to concurrence by the Office of the Premier." Pet. App. 58a-59a.

Finally, the court of appeals' statement that petitioner lacks "financial support from the government" and "special privileges or obligations under Canadian law," Pet. App. 16a, is inaccurate. As petitioner explains (Pet. Br. 31-32), it is

immune from taxation by the Province and Canada's federal government, and it is subject to numerous financial benefits, including the Province's ability to make loans to it or assume its debt. In addition, petitioner has the considerable advantage of a firm commitment to export surplus power generated by BC Hydro, the Province's statutory agent, and of being the assignee of the Province's rights under the Columbia River Treaty. Petitioner is also subject to reporting requirements that Canada imposes on corporations in which the government owns "directly or indirectly" a majority of the shares. See *id.* at 28 n.30, 30 n.31.[12]

3. As demonstrated, even those factors that the court of appeals viewed as detracting from a finding of organ status actually reinforce the close connection between the Province and petitioner and the conclusion that petitioner serves a public purpose on behalf of the Province. Petitioner is much more interrelated with the Province, and much more clearly serves a public purpose on behalf of a foreign sovereign, than many corporations in which a government simply owns a majority of the shares. An entity in which "ownership is divided between a foreign state and private interests," H.R. Rep. No. 1487, at 15, may well be subject to suit and engage predominantly, even exclusively, in activities deemed "commercial" under the FSIA, and may do so to the significant benefit of persons other than the state. But Congress nonetheless categorically afforded such entities the protections of the Act. The alternative "agency or instrumentality" standard should be construed in that expansive light.

There is no reason for the courts to strain, as they did during the period of absolute immunity (see pp. 17-18, *supra*), to avoid recognizing an entity as an agency or instrumentality of

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[12] In the United States, the Government Corporation Control Act, 31 U.S.C. 9101-9110, likewise imposes certain financial requirements, including reporting obligations, on "Government corporation[s]," including, as indicated above, see p. 24 & n.10, *supra*, corporations indirectly owned by the government.

a foreign state. Under the FSIA's framework, "the fact that an entity is an 'agency or instrumentality of a foreign state' does not in itself establish an entitlement to sovereign immunity." H.R. Rep. No. 1487, at 15. But by the same token, "[a]n entity which does not fall within the definitions of sections 1603(a) or (b) would not be entitled to sovereign immunity *in any case*," regardless of whether the conduct at issue was sovereign in nature. *Ibid.* (emphasis added). See *USX*, 345 F.3d at 210. As the Departments of State and Justice recognized when they submitted to Congress the 1973 version of the FSIA, extension of the Act's protections to agencies and instrumentalities was "not likely" to "result in a large number of immunity cases, as most foreign activities of such entities are likely to be commercial and will not be entitled to immunity." 119 Cong. Rec. 3436 (1973). By nonetheless bringing such entities within the FSIA's scope, Congress conferred on them its important procedural protections, as well as immunity from suit when undertaking sovereign functions.

CONCLUSION

The court of appeals' ruling that petitioner is not an agency or instrumentality of British Columbia should be reversed. If the Court concludes that the court of appeals did not have jurisdiction of petitioner's appeal, the judgment of the court of appeals should be vacated only to that extent. See n.6, *supra*.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1447(c) (1982) provides in pertinent part:

If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case and may order the payment of just costs. * * *.

2. 28 U.S.C. 1447(c) (1988) provides in pertinent part:

A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. * * *.

3. 28 U.S.C. 1447(c) (2000) provides in pertinent part:

A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. * * *.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE GOVERNMENT OF CANADA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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This Brief *amicus curiae*[1] is submitted in support of Petitioner with the written consent of both Petitioner and Respondents, copies of which are annexed hereto.

The first issue addressed by Petitioner involves the application of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611 (the "FSIA"), and is accordingly a matter in which Canada has a substantial sovereign interest. Thus Canada submits this Brief setting forth the international law basis for concluding that, when Powerex Corporation is acting on behalf of the Government of British Columbia, it is, and is entitled to be treated as, part of British Columbia, and therefore to be accorded sovereign

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1 No counsel for a party authored this Brief in whole or in part. No person other than the *amicus curiae* made a monetary contribution to the preparation or submission of this Brief.

status under the FSIA.[2] Because Canada believes its views on a matter of significant concern to the Government of Canada and its citizens would materially assist the Court in its consideration of this appeal, Canada respectfully submits this Brief.

THE INTEREST OF *AMICUS CURIAE* THE GOVERNMENT OF CANADA

The Government of Canada, as sovereign, has a vital interest in the issue addressed in this Brief *amicus curiae*: whether, when Powerex Corporation ("Powerex") is acting on behalf of the Government of British Columbia, it is, and is entitled to be treated as, part of British Columbia, and therefore to be accorded sovereign status under the FSIA. Although Powerex concedes it is not immune from suit, the FSIA "guarantee[s] a foreign state defending an unbarred claim certain protections," including the right to have claims against it tried to a United States District Judge, without a jury. *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 484 (2003) (Breyer, J., concurring in part and dissenting in part); *see* 28 U.S.C. § 1603(b)(2).

In deciding to exercise their own powers through political subdivisions or controlled corporations, Canada or its political subdivisions consider whether immunity and other sovereign prerogatives are available, under principles of international law, to the entity through which they choose to act. Under recognized principles of international law,

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[2] Because the second question on which the Court requested briefing appears to be one relating to the jurisdiction of the United States federal appellate courts, and is therefore purely a matter of United States law, Canada believes the parties and the United States are in the best position to address it.

Powerex is entitled to be treated as a sovereign, and to be accorded the benefits of such status under the FSIA, when it is acting on behalf of either British Columbia Hydro and Power Authority ("BC Hydro") or the Government of British Columbia.

Canada has an interest in having in place clear rules that respect fundamental principles of international law and that protect agents of Canada or of its political subdivisions against the risk of scrutiny by state court juries. This interest is embodied in the FSIA, with its recognition of "the potential sensitivity of actions against foreign states." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 496-97 (1983). For the reasons discussed below, the Ninth Circuit's approach to interpreting the FSIA is not compatible with that interest, or, more broadly, with fundamental principles of international law. The Ninth Circuit's divergence from the analytical framework followed by other circuit courts of appeals -- which fits the international law framework -- also creates substantial uncertainty as to the rules that will be applied to Canada and its political subdivisions. Canada believes this Court should resolve this difference in approach in favor of the other circuits' analyses.

Canada has an especially strong interest in the practical consequences of this Court's decision because, given the interdependence of the economies of Canada and the United States -- which enjoy the largest bilateral trading relationship in the world -- the denial of sovereign status to agents of Canada or its political subdivisions is likely to have significant effects on the conduct of business across the Canadian-United States border.

Canada supports Petitioner's request that this Court reverse the decision below because of its strong interest in ensuring that the entities through which it and its political

subdivisions act are properly accorded sovereign status, including the benefits due sovereigns under recognized principles of international law, which should apply in interpreting the FSIA.

SUMMARY OF ARGUMENT

The Ninth Circuit found -- and Canada agrees -- that British Columbia is itself a "political subdivision" or "constituent unit" of Canada, thereby coming under the definition of "state" or "sovereign" provided by the FSIA. *California* v. *NRG Energy, Inc.*, 391 F.3d 1011, 1024-25 (9th Cir. 2004). Powerex is wholly owned by BC Hydro, which is itself treated as a foreign sovereign. The Ninth Circuit concedes BC Hydro to have been, in all respects relevant to this lawsuit and at all relevant times, performing "sovereign functions." *Id.* at 1025. Under recognized principles of international law, Powerex is equally entitled to be treated as a sovereign when it is acting on behalf of BC Hydro or of the Government of British Columbia. Those principles also require that great weight be given to the views of British Columbia regarding Powerex's sovereign status.

Determination of sovereign status is governed by rules of customary international law regarding the sovereign equality of States and non-interference by one State in the internal affairs of another. *See, e.g.*, Ian Brownlie, *Principles of Public International Law* 287-88 (6th ed. 2003); *Oppenheim's International Law*, 81-82 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992). Both of these tenets are fundamental to the international legal system. Thus, courts charged with determining the content of the applicable rules must look to the practice of States on questions of immunity and sovereign status. These are found both in national law -- legislation and decisions of national

courts -- and in the principles codified in the United Nations Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. G.A., 59th Sess., U.N. Doc. A/RES/59/38 (Dec. 16, 2004).

Principles of comity recognized by both Canadian and United States courts require courts to interpret their national legislation in a manner consistent with international law and the practice of States in all cases in which it is possible to harmonize the two, as it is here. Complying with international law principles serves the interests of predictability, enabling a sovereign to determine the best way to structure its activities and to exercise its powers. Honoring comity ensures that the views of the sovereign that creates an entity -- as British Columbia did with respect to BC Hydro and Powerex -- are accorded special weight in deciding whether an entity like Powerex is an organ, agency, or instrumentality of British Columbia.

Rules of international comity promote the cooperation and accommodation essential to the orderly and harmonious regulation of international commerce. Adherence to these principles is essential to the functioning of the closely related economies of Canada and the United States. Disregard of these fundamental principles, where the responsible government itself has chosen to act through particular State entities, will only complicate and impede commercial relations between the two countries. Disregard of international law also intrudes upon, and derogates, the sovereign prerogatives, rights, and interests of the Government of Canada and its Provinces and other political subdivisions to decide the manner in which Governmental activities will be conducted.

ARGUMENT

I.

UNITED STATES COURTS SHOULD INTERPRET THE FSIA IN A MANNER CONSISTENT WITH PRINCIPLES OF COMITY AS APPLIED IN CUSTOMARY INTERNATIONAL LAW AND THE PRACTICE OF STATES.

Principles of international law and comity properly apply when United States courts consider how they should interpret the term "sovereign" under the FSIA. The importance of comity is heightened in this particular case, where the political subdivision that created Powerex, and determined what functions it should perform, has a view very different from that of the Ninth Circuit as to whether Powerex is entitled to the procedural protections accorded to sovereigns. This Court should not affirm the ruling below, which disregards the views of the sovereign that creates an entity and the standards for determining sovereign status applied by the State under whose laws the entity was formed. A decision by this Court affirming the Ninth Circuit would adversely affect the ability of foreign sovereigns, such as Canada and its political subdivisions, to determine with certainty how their structuring of the entities through which they conduct their affairs will in fact effect their sovereign goals. Acceding to principles of comity of nations would, in contrast, lead to an interpretation of the FSIA that is consistent with that of other States and international law.

This Court, like Canadian courts, has long held that international law considerations form an essential element of statutory construction. Over two hundred years ago, Chief Justice Marshall articulated what has become a fundamental canon of statutory construction, namely, that "an act of

Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

This Court has repeatedly reaffirmed the vitality of Chief Justice Marshall's rule, firmly establishing principles of comity as part of the jurisprudence of the United States. Thus, the opinion in *F. Hoffman-LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004), followed the rule that "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Id.* at 236.

The Courts of Appeals have similarly recognized the fundamental role of comity in United States jurisprudence. In *United States* v. *Aluminum Co. of Am.*, 148 F. 2d 416 (2d Cir. 1945), for example, Judge Learned Hand cautioned that "we are not to read general words, such as those in [the Sherman Act] without regard to the limitations customarily observed by nations upon the exercise of their powers . . . ." *Id.* at 443. *See also Restatement (Third) of Foreign Relations Law of the United States* § 403 (1987), the commentary to which confirms the "rule of construction" that statutes must be interpreted whenever possible to avoid unreasonableness or "conflict with the law of another state." *Id.*, cmt. g.

Principles of comity are also firmly established in Canadian jurisprudence. Indeed, as the Supreme Court of Canada has observed, "[t]he notion of comity has retained its vitality in the jurisprudence of Canadian courts." *Spar Aerospace Ltd.* v. *Am. Mobile Satellite Corp.*, 4 S.C.R. 205, 219 (Can. 2002).

The Supreme Court of Canada has repeatedly defined comity in terms that echo decisions of this Court. In *De Savoye* v. *Morguard Invs. Ltd.*, 3 S.C.R. 1077, 1096 (Can.

1990), the Supreme Court recognized that "'comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Id.* Rather, because it is founded on "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws," comity cannot legally be disregarded. *Id.* (citing *Hilton* v. *Guyot*, 159 U.S. 113, 163-64 (1895)). *See also Pro Swing Inc.* v. *ELTA Golf Inc.*, 2006 A.C.W.S.J. 157, at *26 (Can. 2006) (invoking the definition of comity developed by the United States Supreme Court in *Hilton* v. *Guyot*, 159 U.S. at 163-64); *Spar Aerospace*, 4 S.C.R. at 219 (same).

In this case, no reason appears for either the Ninth Circuit or this Court, in interpreting the FSIA, to decline to follow principles of comity long established in United States, Canadian and international law. Following these principles in this case counsels that United States courts should give considerable weight to the views of the Government of British Columbia -- the entity that created Powerex -- as to whether Powerex is entitled to be accorded the procedural safeguards due a sovereign under the FSIA. 28 U.S.C. § 1603.

II.

THE DECISION BELOW CONFLICTS WITH PRINCIPLES OF INTERNATIONAL LAW UNDER WHICH ENTITIES EXERCISING SOVEREIGN FUNCTIONS SHOULD BE TREATED AS SOVEREIGNS.

The United Nations Convention on the Jurisdictional Immunities of States and Their Property codifies the customary international law of State immunity. Article 2(1)(b)(iii) of that Convention includes in the definition of a "State" "agencies or instrumentalities of the State or other entities, *to the extent that they are entitled to perform and are actually performing* acts in the exercise of sovereign authority of the State." G.A. Res. 59/38, *supra* (emphasis added). The Convention thus confirms the importance under international law of an entity's *function* in analyzing whether it qualifies for sovereign treatment.

Although the Ninth Circuit correctly held that the Province of British Columbia, a political subdivision of Canada, is entitled to sovereign treatment under the FSIA, *see NRG Energy, Inc.*, 391 F. 3d at 1024-25, it did not consider the "function" test applied by courts around the world to determine whether agents and sub-agents of political subdivisions should also be accorded sovereign status. *Cf.* State Immunity Act, R.S.C., ch. S-18, § 2 (1985) (Can.) (defining "foreign state" to include, *inter alia*, "any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state"). Yet, under international law, the function test should be considered in deciding whether an "agent" or an "organ" is

to be treated as a sovereign. *See, e.g.*, Brownlie, *supra* at 336-37.

In many countries, including Canada, separate juridical status creates a presumption against immunity. However, that presumption is overcome when the entity is exercising sovereign functions. This approach can be found in the legislation of the United Kingdom, South Africa, and others. *See* State Immunity Ordinance, No. VI of 1981, § 15(2) (Pakistan); State Immunity Act, Cap 313, § 16(2), *available in* Materials on Jurisdictional Immunities of States and Their Property (United Nations Legislative Series), U.N. Doc. ST/LEG/SER.B/20 32 (1982) (Singapore); Foreign States Immunities Act 87 of 1981, § 15(1) (South Africa); State Immunity Act, 1978, § 14(2) (U.K.), *reprinted in* 17 I.L.M. 1123 (1978). In countries such as Australia, legislation provides as well that agencies and instrumentalities of foreign States are immune in relation to acts of sovereign authority if the immunity had been available to the State itself in the circumstances. Foreign States Immunities Act, 1985, No. 196 of 1985, *amended by* Statute Law (Miscellaneous Provisions) Act, 1987, No. 141 of 1987.

The United States, in its brief *amicus curiae* supporting the petition for a writ of certiorari, similarly advocates an analysis that focuses on an entity's *function* on behalf of a sovereign -- such as Powerex's "important role in discharging Canada's treaty obligations." *See* Brief for the United States as *Amicus Curiae* at 12. Canada is in agreement with the position taken by the United States in that Brief *Amicus Curiae*. The function test enjoys widespread acceptance by States, including the United States, and forms a relevant ground of decision that was ignored by the Ninth Circuit.

Under the function test, as under the principles of comity of nations addressed above, the views of the Province of British Columbia are of special relevance. Given British Columbia's position that Powerex was created to fulfill a sovereign function, and that it was doing so at all times relevant to this action, this Court should, consistent with international law and practice, accord to Powerex the procedural benefits it seeks under the FSIA.

CONCLUSION

This Court should follow principles of international law and the practice of States regarding comity of nations, including the importance of the "function test," to determine whether Powerex is to be treated as a sovereign. Under these principles, it was unreasonable for the Ninth Circuit to construe the FSIA to exclude from the definition of "sovereign" a corporation wholly owned by an agent of British Columbia, which British Columbia formed for the purpose of, and considers to have been, carrying out a sovereign function. Canada urges this Court to reverse the judgment of the Ninth Circuit, whose holding improperly disregarded the "function" test applied by courts around the world and advocated by the United States in this case, and further, ignored the views of the Province of British Columbia in determining whether Powerex should be accorded sovereign status.

Dated: Washington, D.C.
March 5, 2007

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BRIEF OF LAW PROFESSORS ARTHUR R. MILLER, ERWIN CHEMERINSKY, MICHAEL E. SOLIMINE, ADAM N. STEINMAN, E. FARISH PERCY, AND RHONDA WASSERMAN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE[1]

Professor Arthur R. Miller is the Bruce Bromley Professor of Law at Harvard Law School. He has devoted his teaching and writing career to an understanding of federal courts, civil procedure, and federal practice. Among his numerous publications are the leading treatise in federal practice and the leading casebook in civil procedure. Charles Alan Wright & Arthur R. Miller, *et al.*, *Federal Practice and Procedure* (West 2006); Jack H. Friedenthal, Arthur R. Miller, John E. Sexton & Helen Hershkoff, *Civil Procedure: Cases and Materials* (West 9th ed. 2005). In addition, he has written numerous articles and consulted on numerous cases raising novel issues of federal practice and procedure.

Professor Erwin Chemerinsky is the Alston & Bird Professor of Law and Political Science at Duke University. He is the author of *Federal Jurisdiction* (Aspen Law & Business 4th ed. 2003), a one-volume treatise on the jurisdiction of the federal courts, as well as three books on constitutional law. He is the author of numerous law review articles on constitutional law and federal procedure, and frequently argues appellate cases in the United States Supreme Court and the United States Courts of Appeals.

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[1] Letters of consent to the filing of this brief are being filed in conjunction with this brief. Pursuant to this Court's Rule 37.6, counsel states that this brief was not authored in whole or in part by counsel for a party and that no one other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

since 1987. He teaches and has written numerous articles on civil procedure and federal courts. He also has written extensively on federal appellate practice, and is the co-author of the new edition of a leading appellate practice casebook. Robert J. Martineau, Kent Sinclair, Michael E. Solimine & Randy J. Holland, *Appellate Practice and Procedure: Cases and Materials* (West 2d ed. 2005).

Professor Adam N. Steinman is an Assistant Professor of Law at the University of Cincinnati College of Law. His areas of expertise include civil procedure, federal practice and procedure, and appellate practice and procedure. Professor Steinman has published numerous articles in the areas of civil procedure, federal jurisdiction, removal, appellate procedure, and statutory interpretation. He has also briefed and argued numerous cases in the United States Courts of Appeals.

Professor E. Farish Percy is an Assistant Professor of Law at the University of Mississippi School of Law and teaches Civil Procedure. Her recent research and publications have focused on civil procedure and federal court jurisdiction. She has repeatedly argued that federal courts should not exceed their limited statutory jurisdiction.

Professor Rhonda Wasserman is a Professor of Law at the University of Pittsburgh School of Law, where she has been a member of the faculty since 1986. She teaches and has written numerous articles on civil procedure and federal practice. She serves as the Reporter to the Local Rules Committee of the United States District Court for the Western District of Pennsylvania. Professor Wasserman is the author of *Procedural Due Process* (Praeger 2004), a one-volume treatise on due process.

Having devoted their careers to teaching and writing about the federal courts and working for their improved

administration, amici have a keen interest in seeing that those courts function efficiently. It is equally important that the lower federal courts function only as Congress has authorized. Unless the court below is reversed, appellate panels will continue to entertain appeals that Congress has specifically prohibited.

SUMMARY OF THE ARGUMENT

Prior to *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), this Court had consistently held that 28 U.S.C. § 1447(d) and its predecessor statutes forbade appeal of a district court's remand order under *any* circumstances. *See United States v. Rice*, 327 U.S. 742, 749 (1946). This time-honored bar to appellate review of remand orders rested on Congress's legislative "policy of not permitting interrupt[ion] of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *Id.* at 751. In an apparent effort to address an injustice in a particular case, *Thermtron* for the first time created an exception to § 1447(d)'s categorical rule, holding despite the statute's plain language that when a district court's decision to remand is based on "grounds not provided by [] statute," the court's order is subject to appellate review. *Thermtron*, 423 U.S. at 350.

Thermtron's exception to § 1447(d)'s explicit bar to appeals was without support in the language of the statute as it then existed. Moreover, since *Thermtron* was decided, Congress has amended the removal statute in a way that eliminated the textual basis on which the *Thermtron* exception is based. Therefore, even if the removal statute as it stood in 1976 supported appeals of a limited class of remand orders, it no longer does so. In those cases where Congress has sought to create appellate jurisdiction over remand orders in spite of § 1447(d), it specifically provided for such review. Federal courts should not supplement these express statutory exceptions

with additional, judicially created exceptions to Congress's no-appeal rule.

Chief Justice Rehnquist, then Associate Justice, in his dissent in *Thermtron* called the Court's new exception "both unworkable and portentous of the significant impairment of Congress' carefully worked out scheme." *Id.* at 357 (Rehnquist, J., dissenting). Chief Justice Rehnquist's words have proved prophetic. In the years since *Thermtron*, the lower courts have struggled with the limits of the exception, creating several circuit splits and eviscerating Congress's clear statutory rule. *See* 14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3740 (3d ed. 2006). In practice, *Thermtron* has allowed defendants to undermine the purpose of § 1447(d) by subjecting plaintiffs in state court actions to unjustified delays during the appeal of a district court's remand order.

Because it is difficult or impossible to distinguish a remand order that is not authorized by statute and is thus subject to appeal under *Thermtron* from a remand order that is merely erroneous and thus unappealable under § 1447(d), the Court should take this opportunity to end the confusion in the lower courts by overruling *Thermtron* or limiting it to its particular facts. In any case, the district court's decision below purported to be based on a lack of subject matter jurisdiction and therefore is barred from appellate review by § 1447(d).

ARGUMENT

I. The Plain Language of § 1447 Does Not Support the *Thermtron* Exception.

A. *Thermtron* Incorrectly Interpreted the Statutory Language as It Then Existed.

It is difficult to imagine how Congress could more clearly have expressed an intent to bar all appellate review of remand orders than it did in 28 U.S.C. § 1447(d): "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." Prior to *Thermtron*, the Court faithfully enforced Congress's explicit statutory bar regardless of the reasons underlying the district court's decision to remand. *See Rice*, 327 U.S. at 748-50. Indeed, since the first predecessor to § 1447(d) was enacted in 1887, the Court had consistently held that *no* appeal of remand orders was permissible under the statute. *Id.* at 749.

Thermtron for the first time created an exception to this categorical rule, holding that the basis of the district court's decision to remand in that case—its crowded dockets—was one that the court "had no authority to consider." *Thermtron*, 423 U.S. at 351. The Court held that § 1447(d) "must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995). Thus, courts of appeals had jurisdiction over a remand order as long as the remand was not based on either a defect in removal procedure or a lack of subject matter jurisdiction—the two grounds for remand recognized by § 1447(c). *Id.* at 127-28.

Given the unambiguous statutory language of § 1447(d), however, the Court's resort in *Thermtron* to a canon of statutory construction for its interpretation of the statute was, with all

respect, unconvincing. Section 1447(d) states simply and plainly that *any* order remanding a case is unreviewable. As the Court noted in *Rice* when construing § 1447(d)'s predecessor, "[s]tatutory language and objective, thus appearing with reasonable clarity, are not to be overcome by resort to a mechanical rule of construction, whose function is not to create doubts, but to resolve them when the real issue or statutory purpose is otherwise obscure." *Rice*, 327 U.S. at 752-53. The plain meaning of § 1447(d) does not lead to results that are "absurd or glaringly unjust," *United States v. Rodgers*, 466 U.S. 475, 484 (1984) (quotation omitted), and is therefore controlling. Yet, the Court's decision in *Thermtron* discounted the clear statutory language, holding in effect "that § 1447(d) does not mean what it says." *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992).

Since *Thermtron* was decided, it has faced substantial academic criticism on the ground that it ignored Congress's expressed intent to bar appellate review of remand orders.[2] The Court should take this opportunity to recognize that *Thermtron* was wrongly decided and that its implicit exception to the appellate bar contravenes the statute's plain language.

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[2] *See, e.g.*, 14C Wright, Miller & Cooper, *supra*, § 3740, at 525-27; Thomas F. Lamprecht, Note, *How Can It Be Wrong When It Feels So Right? Appellate Review of Remand Orders Under the Securities Litigation Uniform Standards Act*, 50 Vill. L. Rev. 305, 313-15 (2005); Thomas R. Hrdlick, *Appellate Review of Remand Orders in Removed Cases: Are They Losing a Certain Appeal?*, 82 Marq. L. Rev. 535, 548-55 (1999); Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 Emory L.J. 83, 115-19 (1994); Michael E. Solimine, *Removal, Remands, and Reforming Federal Appellate Review*, 58 Mo. L. Rev. 287, 297-306 (1993).

B. Congress's Subsequent Amendment of § 1447 Has Eliminated Any Textual Basis for the *Thermtron* Exception.

Regardless of the correctness of *Thermtron*'s interpretation of § 1447 as it stood in 1976, that interpretation is no longer tenable in light of Congress's subsequent amendment to the statute. In 1996, Congress amended § 1447(c) to read:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. § 1447(c). The amended statutory language undermines *Thermtron*'s interpretation of the statute in two distinct but interrelated ways.

First, *Thermtron* predicated its holding that some remand orders are appealable on the majority's conclusion that Congress did not intend to permit remands unauthorized by § 1447(c), which prior to the 1996 amendment provided for remands only for lack of subject matter jurisdiction or for defects in removal procedure. *Things Remembered*, 516 U.S. at 127.[3] Because § 1447(c) covered only these two grounds for

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[3] At the time *Thermtron* was decided, § 1447(c) covered cases that were "removed improvidently" or "without jurisdiction." *See Thermtron*, 423 U.S. at 432. The Court interpreted "removed improvidently" to mean cases that were removed "improperly," in that there was some defect in removal procedure. *Id.* at 350 n.15; *see*

(continued...)

remands, the Court held remands for any other ground to be without legal basis and therefore outside § 1447(d)'s appellate bar. *Thermtron*, 423 U.S. at 351. The new version of § 1447(c), however, provides for remands based both on defects of subject matter jurisdiction and defects " *other than* lack of subject matter jurisdiction." 28 U.S.C. § 1447(c) (emphasis added). Because a remand is necessarily based either on lack of subject matter jurisdiction or on some other ground, the plain language of § 1447(c) now covers *all* remands, and *Thermtron*'s distinction between those remands that are "issued under § 1447(c)" and those that are not no longer finds any support in the statutory language. On the contrary, to read § 1447(d) "in pari materia" with § 1447(c), as *Thermtron* commands, 423 U.S. at 345-46, now compels the opposite conclusion as the one reached by the Court in *Thermtron*.

Second, the language of § 1447(c) can no longer be read, as the Court read it in *Thermtron*, as an enabling statute granting district courts the authority to remand. The statute's plain language does not purport to either grant or limit a district court's remand authority, but only to provide a thirty-day time limit for certain remand motions to be made. Thus, a key premise of *Thermtron*—that § 1447(c) set forth the sole basis for a district court's authority to remand —no longer has any basis in the statute. Indeed, this Court has recognized that *Thermtron*'s reading of § 1447(c) was incorrect, noting that, despite *Thermtron*'s "admittedly far-reaching" language, district courts have the power to remand cases in circumstances not

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[3](...continued)
Hrdlick, *supra* note 2, at 549 & n.67. Congress later replaced the "removed improvidently" language with "defects in removal procedure," which is how the statute stood when *Things Remembered* was decided. 516 U.S. at 127-28.

included in the statute. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 355-56 (1988) (recognizing that a district court's discretionary remand of pendent state-law claims does not fall within § 1447(c)'s language); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996) (recognizing that a district court remand for reasons of abstention is outside § 1447(c)'s authority); *Things Remembered*, 516 U.S. at 128-29 (applying the § 1447(d) appellate bar to a remand of a bankruptcy case under § 1452(b)).

To be sure, the legislative history of this amendment to § 1447(c) does not indicate that Congress intended to modify the scope of § 1447(d)'s appellate bar. *See* Hrdlick, *supra* note 2, at 561-69 (examining the legislative history). [4] Resort to legislative history, however, is unnecessary given that the plain language of the statute no longer supports the implicit exception to § 1447(d) that *Thermtron* read into the statute. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.* , 545 U.S. 546, 568 (2005) (holding that legislative history may be consulted only when the statute is ambiguous). Congress's removal of the statutory basis for the *Thermtron* exception is particularly telling given the lack of evidence in the text or legislative history demonstrating Congress's intent to create such an exception in the first place.

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[4] Courts of appeals examining the question have relied on this legislative history to hold that the 1996 amendment did not alter the scope of the *Thermtron* exception. *Autoridad de Energia Electrica de Puerto Rico v. Ericsson Inc.*, 201 F.3d 15, 17 (1st Cir. 2000); *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1258-59 (11th Cir. 1999); *Hudson United Bank v. LiTenda Mortgage Corp.*, 142 F.3d 151, 156 n.8 (3d Cir. 1998).

C. Congress Has Created Specific Exceptions to § 1447(d)'s Bar on Appeals When It Has Deemed Them Necessary.

Absent a "clear statutory command to the contrary," Congress is presumed to have intended § 1447(d)'s bar to apply to a district court's remand order, "regardless of whether removal was effected pursuant to § 1441(a)" (which is the general removal statute) or "under *any other statutes*, as well." *Things Remembered*, 516 U.S. at 128 (quotation omitted). When Congress has intended to create an exception to the general rule of non-appealability, it has not hesitated to provide the necessary statutory language. For example, § 1447(d) itself provides that civil rights cases "removed pursuant to section 1443 of this title *shall be reviewable* by appeal or otherwise." 28 U.S.C. § 1447(d) (emphasis added). Similarly, Congress in the Class Action Fairness Act of 2005 specifically provided for *permissive* appellate review "*notwithstanding section 1447(d)*." *Id.* § 1453(c)(1) (emphasis added).[5]

In *Osborn v. Haley*, 127 S. Ct. 881 (2007), this Court examined a provision of the Westfall Act mandating that the Attorney General's certification that a federal employee defendant was acting within the scope of his employment be considered "conclusiv[e] . . . for purposes of removal." 28

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[5] Other exceptions permit the United States to appeal remands in cases involving Native American tribes, and the Federal Deposit Insurance Corporation or Resolution Trust Corporation to appeal remands in cases where they are parties. Wasserman, *supra* note 2, at 104-08. Congress has also expressly allowed limited appeals in cases covered by the Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act. 28 U.S.C. § 1441(e)(3). In those cases, Congress provided that "the remand shall not be effective until the appeal has been finally disposed of." *Id.*

U.S.C. § 2679(d)(2). The Court held that the certification rule acts as an "antishuttling provision" that prohibits a district court from remanding a case to state court after the case has been removed pursuant to the Attorney General's certification. *Osborn*, 127 S. Ct. at 886. Prohibiting appellate review of remand orders despite the Attorney General's certification, the Court held, would render the certification provision "weightless." *Id.* at 895. Thus, the Court concluded that the Westfall Act's antishuttling provision directly conflicts with § 1447(d)'s own antishuttling provision, and that, "of the two antishuttling commands, . . . only one can prevail." *Id.* at 896. The Court emphasized, however, that "only in the extraordinary case in which Congress has ordered the intercourt shuttle to travel just one way—from state to federal court—does [the] decision hold sway." *Id.* It also stressed that its decision "scarcely means that whenever the district court misconstrues a jurisdictional statute, appellate review of the remand is in order," noting that such an exception would "collide head on with § 1447(d), and with our precedent." *Id.* at 895-96.

Congress has thus demonstrated its ability to create exceptions to its categorical rule against appeals of remand orders when it feels such an exception is necessary, either in the form of an explicit authorization of appeals or of an express antishuttling provision of the kind at issue in *Osborn* that is directly inconsistent with § 1447(d)'s categorical rule. The *Thermtron* exception, however, is not supported by a similar "clear statutory command." *Things Remembered*, 516 U.S. at 128. Nor does the Foreign Sovereign Immunities Act (FSIA)—the statute at issue in this case—contain such an exception. *See Linton v. Airbus Industrie*, 30 F.3d 592, 595-96 (5th Cir. 1994); *Mobil Corp. v. Abeille Gen. Ins. Co.*, 984 F.2d 664, 666 (5th Cir. 1993). This Court should use this case to make clear that, in the absence of express legislative authority, the federal courts may not entertain appeals of remand orders or

create new exceptions to Congress's clearly expressed policy.

II. *Thermtron*'s Holding Undermines the Purpose of § 1447(d) by Encouraging Appeal as a Delaying Tactic.

The bar to appellate review of remand orders arises from Congress's "policy of not permitting interrupt[ion] of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *Rice*, 327 U.S. at 751. Congress understood that district courts are not infallible and that some remand orders—presumably a small minority—would be erroneously granted. *Adkins v. Ill. Cent. R.R. Co.*, 326 F.3d 828, 834 (7th Cir. 2003). Nevertheless, a defendant whose case is mistakenly remanded to state court can still obtain a fair trial in that forum, and, in Congress's judgment, any degree of prejudice resulting from denying defendants their forum of choice is outweighed by the importance of avoiding delays caused by prolonged federal court proceedings. *See Thermtron*, 423 U.S. at 355 (Rehnquist, J., dissenting); *see also Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145, 2156 (2006)(recognizing that a state court is "an equally competent body" to decide a case). By providing for removal to the district court but disallowing appeals, Congress struck a balance between the desirability of allowing access to a federal forum and the significant costs of delay on appeal. *Thermtron*, 423 U.S. at 354-55 (Rehnquist, J., dissenting).

The Court in *Thermtron* apparently expected the exception it created to § 1447(d)'s previously firm rule to be a narrow one. After *Thermtron*, the particular basis for the district court's remand in that case—its clogged dockets—cannot be expected to be invoked explicitly as a ground for remand by district courts. *Thermtron*, however, has not been limited to that ground. Courts of appeals have often

been reluctant to let pass a district court's perceived mistakes and, as in this case, have stretched to find the authority to correct them. Indeed, commentators have noted that "[a]t virtually every opportunity, many of the lower courts chose to expand *Thermtron* and create additional exceptions to Section 1447(d)." Solimine,*supra* note 2, at 332; *see also* 14C Wright, Miller & Cooper, *supra*, § 3740 (documenting the long line of lower court cases struggling with the application of *Thermtron* and expanding its scope); Lamprecht, *supra* note 2, at 312 (noting that courts have "whittled away at [§ 1447(d)'s] seemingly decisive language"); Wasserman, *supra* note 2, at 119. The result has been a "gradual evisceration" of the § 1447(d) bar. Lamprecht, *supra* note 2, at 311; *see also* Solimine, *supra* note 2, at 288 (noting that post-*Thermtron* cases in the lower courts "permit federal appellate review of district court remand orders in a wide variety of circumstances").[6]

The Ninth Circuit decision below represents just one way in which the courts of appeals have adopted rules to avoid the appellate bar. Relying on a line of cases originating with its decision in *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984), the court held that it had the authority to review "substantive" decisions that "preceded the remand order." Pet. App. 10a. Other circuits have relied on

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[6]A 2005 Westlaw search identified 250 cases in the previous ten years in which courts of appeals had to construe and apply § 1447(d). Out of 148 reported decisions addressing the propriety of hearing an appeal from a remand order (not including cases removed under § 1443), the majority of cases (83) allowed review. Of the 102 unreported decisions, 19 cases were found to be within the court of appeals' jurisdiction. Thus, even counting the unreported cases, more than 40 percent of the appealed remands were found to be within the court's appellate jurisdiction.

Pelleport for authority to review substantive decisions of district courts.[7] Courts of appeals have also adopted various other judicially created exceptions to the statutory no-appeal rule, holding, for example, that the appellate bar excludes jurisdictional issues that arise after the time of removal,[8] appeals of constitutional issues,[9] and a variety of other categories of cases.[10]

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[7] *See, e.g., Milk 'N' More, Inc. v. Beavert*, 963 F.2d 1342, 1344-45 (10th Cir. 1992); *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1204 (5th Cir. 1991); *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1211 (3d Cir. 1991); *Regis Assocs. v. Rank Hotels Mgt. Ltd.*, 894 F.2d 193, 194-95 (6th Cir. 1990); *Karl Koch Erecting Co. v. N.Y. Convention Ctr. Dev. Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988). The Ninth Circuit's decision in *Pelleport* was based on this Court's decision in *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 143 (1934), which allowed appeal of a district court decision that "in logic and in fact" preceded a remand order. *Waco*, however, was decided before Congress adopted § 1447(d)'s appellate bar. *See Osborn*, 127 S. Ct. at 909 (Scalia, J., dissenting) (noting that "the continued vitality of *Waco* is dubious in light of more recent precedents").

[8] *See, e.g., Reddam v. KPMG LLP*, 457 F.3d 1054, 1058-59 (9th Cir. 2006). *But see Linton*, 30 F.3d at 599-600.

[9] *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 843 (3d Cir. 1991).

[10] *See, e.g., Carr v. Am. Red Cross*, 17 F.3d 671, 680 (3d Cir. 1994) (allowing appellate review of dispositive district court orders that are separable from the merits, even if the order is jurisdictional in nature and triggers an order of remand); *Air-Shields, Inc. v. Fullam*, 891 F.2d 63, 66 (3d Cir. 1989) (allowing review where the district court remanded a case for procedural defects after expiration of the thirty-day time limit in § 1447(c)); *Rothner v. City of Chicago*, 879 F.2d 1402, 1408 (7th Cir. 1989) (allowing appellate review of a remand based on waiver of the right to remove); *see also* 14C

(continued...)

Moreover, lower courts have generally held that a district court's remand order based on its discretionary power to remand supplemental state law claims pursuant to 28 U.S.C. § 1367 are appealable because they do not fall within the bounds of § 1447(c).[11] As previously mentioned, however, *Thermtron*'s holding of reviewability was predicated on the majority's conclusion that Congress did not intend to permit remands unauthorized by statute. *Thermtron*, 423 U.S. at 350. Now that this Court has recognized the district courts' authority to remand supplemental claims, *see Carnegie-Mellon Univ.*, 484 U.S. at 355-56, these remands should not be appealable even under the logic of *Thermtron*. *See* Solimine, *supra* note 2, at 307-08; *see also Things Remembered*, 516 U.S. 124, 129-30 (1995) (Kennedy, J., concurring) (noting that the Court has not decided whether remands pursuant to a district court's supplemental jurisdiction are appealable).

Unfortunately, the courts of appeals' allowance of appellate review in *some* remand cases effectively allows appellate review in *all* remand cases. Defendants in state court actions can always argue that appellate review of the district court's remand decision should be available under an exception to § 1447(d). These appeals do not need to be meritorious to achieve the purpose of delay; it was, after all, primarily a concern with the possibility of the delay resulting from *unmeritorious* removals that caused Congress to enact the appeals bar in the first place, and there is no reason to think that

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[10](...continued)
Wright, Miller & Cooper, supra, § 3740, at n.30 (listing cases); Wasserman, *supra* note 2, at 126-27 (listing a variety of other exceptions).

[11] *See, e.g., Thomas v. LTV Corp.*, 39 F.3d 611, 616 (5th Cir. 1994).

litigants who engage in such removals will not press their positions on appeal. The median length of an appeal in the federal courts of appeals is 12.2 months, which includes many appeals that are dismissed promptly because of procedural flaws or failure to meet deadlines.[12] By appealing a district court's remand order and arguing that an exception to the no-appeal rule applies, state court defendants compound the initial delay caused by removal by achieving an additional delay on appeal. *Amoco*, 964 F.2d at 708 ("Complex proceedings just to determine whether a remand is reviewable by the court of appeals defeat the speed and simplicity that one would have thought to be the principal justification for § 1447(d)."); *see* Solimine, *supra* note 2, at 304-05 ("The bar to review does little good if the putative reviewing authority is forced to ask in every case if the remand order is without the bounds of 'correctness.'").

In this case, Petitioner argues for yet another implicit exception to § 1447(d)'s appellate bar for cases remanded pursuant to the FSIA, an exception that has never been adopted by any lower court. *See Linton*, 30 F.3d at 595-96; *Mobil Corp.*, 984 F.2d at 666. In support of this proposed exception, Petitioner stresses the potential for an erroneous decision by the district court and asserts that "Congress could not have intended § 1447(d) to confer on a single federal district judge unreviewable authority to deny a foreign sovereign its right

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[12] Administrative Office of the United States Courts, 2006 Annual Report of the Director, Table B-4, *available at* http://www.uscourts.gov/judbus2006/appendices/b4.pdf. In the Ninth Circuit, the median length of an appeal is even longer—15.9 months. *Id.* Of course, if the defendant petitions for a writ of certiorari, the delay is further increased. The Ninth Circuit decided this case, for example, in December 2004.

under the FSIA to a bench trial in federal court." Pet. Br. 48. But the potential that a district court will make an erroneous determination is *always* a cost of denying appellate review in removal cases. Moreover, Petitioner's view of what Congress must have intended runs headlong into Congress's contrary and clearly expressed policy against "interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction." *Kircher*, 126 S. Ct. at 2152 (quotation omitted).

There is no reason to believe that Congress viewed appeals of remands under the FSIA as any more important than appeals in the variety of other contexts in which defendants are entitled to a federal forum. This Court rejected a similar argument—that Congress must have intended for appellate review of remand orders in cases removed pursuant to the Securities Litigation Uniform Standards Act—last term in *Kircher*, noting that Congress had not specifically provided for such appeals. *Id.* at 2154 n.8. When Congress believes that policy interests make appellate review necessary, it has created specific statutory exceptions. *See* Wasserman, *supra* note 2, at 105-07. Section 1447(d)'s exception for appeals of remand orders in civil rights cases, for example, was based on Congress's "perception that remands of civil rights cases were particularly injurious to defendants in those cases, and that appellate exposition of Section 1443 was necessary." Solimine, *supra* note 2, at 293. In other circumstances, however, courts must respect Congress's judgment that the desirability of granting access to a federal court of appeals does not justify the resulting cost of delay. *See Kircher*, 126 S. Ct. at 2154 n.8 (holding that, in the absence of a "clear statutory command," Congress's "silence tells us we must look to 28 U.S.C. § 1447(d) to determine the reviewability of remand orders").

III. Appellate Review of the District Court's Remand Order in This Case Should Be Prohibited.

A. This Court Should Overrule *Thermtron* Or Limit It to Its Specific Facts.

Because *Thermtron* has led to widespread uncertainty and disregard of the statute's plain meaning in the lower courts, amici urge the Court to take this opportunity to overrule *Thermtron* and eliminate the judicially created exception to Congress's express policy against appeals of remand orders. Alternatively, this Court should prevent any additional erosion of § 1447(d)'s rule by limiting *Thermtron* to the particular facts of that case, leaving any further modifications of § 1447(d) to Congress. *See Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 127 (2d Cir. 2003) ("It is not our place as jurists to supply that which is omitted by the legislature.").

Developments before this Court in another area of appellate jurisdiction parallel the approach that amici suggest here with respect to *Thermtron*. The principal basis for federal appellate jurisdiction is 28 U.S.C. § 1291, under which litigants may appeal only from "final decisions" of the district courts. In general, § 1291 means what it says: A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521-22 (1988) (quotation omitted). Under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), § 1291 also includes a narrow category of orders that do not end the entire litigation, but finally decide an important issue that is wholly collateral to the merits of the litigation, review of which is necessary to prevent irreparable harm. Some fifteen years after *Cohen*, however, in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), the Court took *Cohen* well beyond its original narrow purpose and allowed an interlocutory

appeal simply where the district court had dismissed one set of claims on their merits but not another. The Court acknowledged that appellate review in that case "could be called 'piecemeal,'" but justified erosion of the "final decision" rule based on the Court's own view of "the inconvenience and cost" of trying the case prior to appeal, and its concern that delay in resolving the claims could work "a great injustice" to the plaintiffs. *Id.* at 153. In dissent, Justice Harlan noted that these reasons "furnishe[d] no excuse for avoidance of the finality rule," and sounded an alarm, not unlike the alarm sounded by Chief Justice Rehnquist in *Thermtron*, that such arguments could support review in many interlocutory appeals. *Id.* at 167-70 (Harlan, J., dissenting).

In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the Court put on the brakes. After holding that a district court order denying class certification is not an appealable collateral order under *Cohen*, as properly and narrowly construed, the Court rejected the plaintiffs' reliance on *Gillespie*, effectively ending its relevance as a § 1291 precedent. "If *Gillespie* were extended beyond the unique facts of that case," Justice Stevens explained, "§ 1291 would be stripped of all significance." *Id.* at 477 n.30. So, too, here, if *Thermtron* were allowed to expand beyond its highly unusual circumstances, the strict no-appeal policy expressed by Congress in § 1447(d) would be seriously eroded, if not destroyed entirely.

B. At a Minimum, this Court Should Prohibit Second-Guessing of a District Court's Basis for Remand.

As Chief Justice Rehnquist pointed out in his *Thermtron* dissent, a district court can be said to be acting outside its statutory authority, and therefore outside of § 1447(d)'s appellate bar, *any* time its grant of remand is erroneous. *See Thermtron*, 423 U.S. at 356 (Rehnquist, J.,

dissenting). Moreover, district courts sometimes remand on purportedly jurisdictional grounds, but either do not explain the basis for their lack of jurisdiction or provide an explanation that is not jurisdictional in nature. *See id.* at 357. These problems have led to a circuit split on the question whether the district court's mere use of the word "jurisdiction" is sufficient to deny appellate review, even when it is apparent that the court's ruling was erroneous or was based on a non-jurisdictional and impermissible ground.[13]

The district court's remand order in *Thermtron* was granted solely on the ground that the court's docket was too crowded to permit a speedy resolution of the case, a justification that was without legal basis and "plainly irrelevant to whether the District Court would have had jurisdiction of the case had it been filed initially in that court, to the removability of a case from the state court under § 1441, and hence to the question whether [the] cause was removed improvidently and without jurisdiction within the meaning of the statute." *Id.* Because the district court in *Thermtron* did

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[13] *Compare Heaton v. Monogram Credit Card Bank*, 231 F.3d 994, 997 (5th Cir. 2000) (holding that a court of appeals may review a remand order "only if the district court clearly and affirmatively relies on a non-section 1447(c) basis") (quotation omitted) and *Adkins*, 326 F.3d 828, *with Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1450 (4th Cir. 1996) (holding that if there is any ambiguity about whether the district judge felt that a remand was compelled, the court of appeals must "determine by independent review of the record" what the real basis for remand was). The former approach has also been adopted in slightly modified form by the Third and Tenth Circuits. *See Balazik v. County of Dauphin*, 44 F.3d 209, 213 (3d Cir. 1995); *Archuleta v. Lacuesta*, 131 F.3d 1359, 1362 (10th Cir. 1997) (barring review as long as the district court's finding of no subject matter jurisdiction was made in good faith).

not even purport to dismiss the case based on subject matter jurisdiction or a defect in removal procedure, this Court had no need to second-guess the claimed basis of the district court's decision. On the contrary, the Court stressed that a district court's decision to remand for lack of subject matter jurisdiction was unreviewable on appeal "*whether erroneous or not.*" *Id.* at 343 (emphasis added); *see also Amoco*, 964 F.2d at 708 ("[E]ven an obviously erroneous invocation of § 1447(c) is untouchable."). In *Kircher*, this Court reaffirmed the principle that "review is unavailable no matter how plain the legal error in ordering the remand," 126 S. Ct. at 2154 (quotation omitted), but explicitly declined to decide whether a district court's characterization of its own remand is reviewable on appeal, *id.* at 2154 n.9; *but see id.* at 2157 (Scalia, J., dissenting) (arguing that appellate recharacterization of a district court's remand order is a prohibited form of review).

In contrast to the district court in *Thermtron*, the district court in this case specifically purported to remand on jurisdictional grounds, stating that "the issue hinges . . . on the Court's jurisdictional authority to hear the removed claims." Pet. App. 20a. Moreover, the district court in a later order explicitly invoked § 1447(c) and clarified that its remand order was based on lack of subject matter jurisdiction. *See* JA 283, 287. Petitioner nevertheless urges that the district court's remand order, properly recharacterized, was actually a discretionary remand of state causes of action within its supplemental jurisdiction. Pet. Br. 45-48. Amici take no position on whether Petitioner's view of the district court's jurisdiction is correct, but, regardless, it was not the basis of the court's decision. The district court's remand order never mentions § 1367 or indicates that the court believed the remand was discretionary.

Even if this Court declines to overrule *Thermtron* or limit it to its facts, amici urge it to clear up the uncertainty in the lower courts by deciding that appellate review is barred when a district court purports to rely on jurisdictional grounds in remanding a case. If a court of appeals can second-guess a district court's purported jurisdictional dismissal, § 1447(d)'s bar would "mean[] nothing at all, because appeals will be taken and sustained in those cases where the district court made a mistake, and rejected in cases where the district court was correct." *Adkins*, 326 F.3d 828. As Chief Justice Rehnquist feared, the purportedly narrow exception created in *Thermtron* would have begun to swallow § 1447(d)'s no-appeal rule. The Court should restore the statute to its textual foundation, leaving to Congress the decision to chart a new course on the appealability of remand orders.

CONCLUSION

For the reasons stated above, the decision of the court of appeals should be vacated and remanded with instructions that the case be further remanded to the state court in which it was filed.

Respectfully submitted,

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No. 05-85

In the Supreme Court of the United States

POWEREX CORP.,

Petitioner,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE PROVINCE OF BRITISH COLUMBIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Province is the sole owner of the BC Hydro and Power Authority ("BC Hydro"). In turn, BC Hydro is the sole owner and shareholder of petitioner Powerex. BC Hydro is one of the largest electric utilities in Canada. It is responsible for the generation and distribution of energy to approximately 94% of the Province's population. BC Hydro, *Our System*, *available at* http://www.bchydro.com. Powerex was created by Provincial statute for the public purpose of marketing the Province's surplus power outside the Province. See Hydro and Power Authority Act, R.S.B.C. ch. 12 (1996) (Pet. App. 163a); Pet. App. 53a. To that end, Powerex actively markets the Province's electric power in the western United States.

Powerex's commercial activities in the United States expose Powerex to suit in the United States, and ultimately expose BC Hydro and the Province to potential liability for any judgment that might be entered against Powerex. Any business losses incurred by Powerex are, in the end, absorbed by its ultimate parent, the Province. The burden and expense of Powerex's defense of litigation in the United States are likewise ultimately borne by the Province and its citizens.

The Province is concerned that the decision below reaches a wrong result – one that deprives the Province and its organs of protections the U.S. Congress gave them – by setting and

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, the *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation and submission of this brief.

applying a rigid, mechanical standard that is flatly inconsistent with both the law and the policy of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603 ("FSIA"). Indeed, if upheld, the precedent set by the decision below – one that is at odds with the Ninth Circuit's own previous case law and with the contextual approach adopted by other circuits – will leave numerous other Canadian instrumentalities vulnerable to suit in U.S. state courts. Likewise, if this Court holds that the federal courts do not have jurisdiction to reverse erroneous remand orders in cases removed under the FSIA, such as the remand order below, instrumentalities of foreign states will be subject to inevitably inconsistent and incorrect holdings concerning when they can be sued in state court. Those possibilities have not played into the risk calculations of the Province and its organs in their decisions to engage in commerce in the United States. Therefore, the *amicus* Province has an interest in the reversal of the decision below, and the restoration of the context-sensitive approach to determining "organ" status under the FSIA.

SUMMARY OF ARGUMENT

Under the Foreign Sovereign Immunities Act, an entity qualifies for certain procedural protections if it qualifies as a "foreign state," which is defined to include "an organ" of the foreign state. See 28 U.S.C. § 1603(b)(2). This case arises from the erroneous denial of "organ" status under Section 1603(b)(2) of the FSIA to Powerex, a wholly owned subsidiary of BC Hydro, a Canadian Crown corporation that is, in turn, wholly owned by the Province of British Columbia.

Mindful of the reality that American courts are likely to be unfamiliar with foreign corporate structures and methods of corporate organization, several circuits apply a flexible, contextual test to determine whether an entity constitutes an "organ" of a foreign government under the FSIA. In the decision below, however, the Ninth Circuit applied the "organ" prong to Powerex in a ruthlessly technical manner. The court of appeals stated that

Powerex "was not run by government appointees, was not staffed with civil servants, was not wholly owned by the government, was not immune from suit, and did not exercise any regulatory authority." Pet. App. 15a-16a. Although it grudgingly acknowledged evidence that Powerex serves a public function, the court asserted that Powerex exhibited a "high degree of independence" from the Province. *Id.* at 16a. That alleged "independence," in combination with Powerex's supposed "lack of financial support from the government and its lack of special privileges or obligations under Canadian law," "dictate[d]" the court's holding that Powerex was not an "organ" of the Province. *Ibid.* This Court should reverse that holding.

I. This Court should apply the broad, context-specific test adopted by most of the federal courts of appeals. To further its goal of protecting foreign sovereigns – even when they are not completely immune – from any local bias that may be present in a jury trial in state court, Congress intended that courts apply a broad, flexible, and realistic test to assess "organ" status. Relevant factors include the reasons for an entity's creation, whether the entity serves a public purpose or holds an exclusive right to something in the foreign nation, how the entity is treated under the foreign sovereign's laws, the degree of supervision the foreign government exercises over the entity, and whether the foreign state requires the entity to hire civil servants. The absence of one or more factors cannot be dispositive against "organ" status.

Canadian courts, just like most federal courts of appeals in the United States, have applied a contextual approach to questions of sovereign status. Canadian courts have been generous in recognizing sovereign status for entities that meet criteria similar to those discussed in the U.S. cases. The practice of the Canadian courts is additional reason for this Court to apply a broad, flexible, and realistic test rather than the myopic and grudging approach the Ninth Circuit applied below.

II. The court of appeals ignored – but this Court should give weight to – a wealth of record evidence demonstrating that Powerex serves a public purpose, was *expressly created* to serve that public function, and holds *exclusive* rights in the Province to serve that important public duty. Furthermore, the court paid no heed to the extensive supervision and control that the Province exercises over Powerex, the numerous special privileges that Powerex enjoys under Canadian law, and the degree to which the profits and losses of Powerex are integrated with those of BC Hydro, with Provincial citizens ultimately enjoying the benefits and bearing the burdens of the interdependent relationship between Powerex and the Province. Confusing the *indirectness* of the Province's ownership of Powerex (through BC Hydro) with *incomplete* ownership of Powerex, the court of appeals stated – indefensibly – that Powerex is "not wholly owned by the government." Pet. App. 15a-16a. Powerex is wholly owned by the Province, and to hold the indirectness of that ownership against "organ" status is indefensible because directly owned subsidiaries do not need to argue for "organ" status, but rather are protected by separate language in 28 U.S.C. § 1603(b)(2). A correct analysis of the factors that ought to govern "organ" status makes it overwhelmingly clear that Powerex is an organ of the Province.

III. This Court also requested that the parties address the applicability of 28 U.S.C. § 1447(d). Section 1447(d) provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." In general, this provision acts to bar appeals of remand orders issued under Section 1447(c), which permits remand when, at the time of removal, there is a lack of subject-matter jurisdiction or a defect in the removal procedure. See *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 345-346 (1976).

The Ninth Circuit correctly concluded that, notwithstanding 28 U.S.C. § 1447(d), it had appellate jurisdiction over the district

court's remand order. Section 1447(d) applies only when the order of remand was authorized by Section 1447(c), which permits remand in two situations: where there is a lack of subject-matter jurisdiction, or where there is a defect in removal procedure. See *Thermtron*, 423 U.S. at 346. As neither ground was present here, the order of remand could not have been authorized under Section 1447(c). Section 1447(d) thus cannot apply to preclude appellate review in this case.

Applying Section 1447(d) to bar appellate review of cases removed under the FSIA runs counter to the FSIA's purposes. The FSIA reflects congressional intent to establish a comprehensive statutory scheme that would transfer jurisdiction over issues of foreign sovereign immunity to the federal courts. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 497 (1983) (FSIA's overarching purpose is to "channel cases against foreign sovereigns away from the state courts and into federal courts"). The advantage of this framework is that foreign sovereigns are protected from local bias in state courts. See *In re Texas Eastern Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1239 (3d Cir. 1994). Applying Section 1447(d) apply to preclude appellate review of cases removed under the FSIA would have adverse consequences for foreign relations, particularly because, since the advent of the FSIA, foreign sovereigns have come to expect respectful and uniform treatment in litigation in the United States.

ARGUMENT

I. The Ninth Circuit's Inflexible, Truncated Approach To Determining "Organ" Status Under The FSIA Is Fundamentally Inconsistent With The Policies and Purpose Of The FSIA

A. The FSIA is designed to protect foreign governments from needless litigation in the United States, and to ensure that foreign sovereign immunity decisions are based on legal, rather than political or foreign policy, grounds, thus allowing foreign governments to arrange their affairs according to a settled and consistent set of legal guidelines. *Verlinden*, 461 U.S. at 488. The Act provides a broad grant of legal immunity to foreign governments. The statute provides that, in general, a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" subject to certain exceptions. 28 U.S.C. § 1604. Should an exception apply, as is the case here, the FSIA accords respect to the foreign sovereign by providing the sovereign with procedural benefits, namely the right to defend lawsuits in federal, rather than state, court, and the right to be tried without a jury.

To qualify as a "foreign state" under the FSIA, and benefit from those procedural protections, the entity must meet certain standards. A "foreign state" is defined as any "agency or instrumentality of a foreign state" (28 U.S.C. § 1603(a)), which in turn is defined as:

> any entity – (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or a political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or a political subdivision thereof, and (3) which is neither a citizen of a State of the United States * * * nor created under the laws of any third country.

Id. § 1603(b). The criterion in dispute in this case is Section 1603(b)(2), whether the entity is "an organ of a foreign state."

The general rule is that the term "organ" as it is used in the FSIA is to be interpreted broadly. *Gates* v. *Victor Fine Foods*, 54 F.3d 1457, 1460-1461 (9th Cir. 1995). That principle is consistent with the touchstone of the FSIA: that, in general, foreign sovereigns should be spared the inconvenience, indignity, and expense of litigating in the United States, and, where the foreign government is not entitled to immunity, it is at a minimum entitled to certain procedural safeguards, such as the right to litigate in federal court and be tried without a jury. In granting such protections in the litigation process to foreign sovereigns, the FSIA attempts to "remove any local bias that might be present at a jury trial in a state court." *Davis* v. *McCourt*, 226 F.3d 506, 511 (6th Cir. 2000).

Consistent with the broad approach to "organ" status, the Second, Third, and Fifth Circuits correctly apply a context-sensitive, multi-factor analysis to the "organ" prong of Section 1603. Those courts analyze the entity's status in light of a host of overlapping factors, including the reasons for the entity's creation, whether the entity serves a public purpose or holds an exclusive right to something in the foreign nation, how the entity is treated under the foreign sovereign's laws, the degree of supervision exercised by the foreign government over the entity, and whether the foreign state requires the entity to hire civil servants. See, *e.g.*, *Filler* v. *Hanvit Bank*, 378 F.3d 213, 217 (2d Cir.), *cert. denied*, 543 U.S. 1022 (2004); *USX Corp.* v. *Adriatic Ins. Co.*, 345 F.3d 190, 206-214 (3d Cir. 2003); *Kelly* v. *Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-848 (5th Cir. 2000). Those circuits recognize that, in the spirit of the FSIA and the principle of respect between sovereign nations, it is important to analyze the complete picture of the entity's relationship to the foreign government.

Other circuits also recognize that it is equally important to conduct a *balanced* analysis. Mechanically applying a closed universe of factors or "requir[ing] that all [factors] support an organ-determination" creates a truncated and inaccurate picture of the entity's status. *Kelly*, 213 F.3d at 847. Thus, no single factor in the contextual analysis should be dispositive in the "organ" analysis. See *EIE Guam Corp.* v. *Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 640-641 (9th Cir. 2003) (organ status is appropriate even where the entity enjoys "some autonomy" from the foreign state in light of "district court's key assertion" that the entity served a public purpose); *EOTT Energy Operating Ltd. P'ship* v. *Winterthur Swiss Ins. Co.*, 257 F.3d 992, 997 (9th Cir. 2001) (organ status appropriate even where the foreign state is "not involved in the day-to-day activities" of the entity); *Gates*, 54 F.3d at 1461 (same).

Rather than conduct a balanced, nuanced analysis of Powerex's status, the court below short-circuited the contextual test under the FSIA. The Ninth Circuit denied Powerex "organ" status because it concluded that Powerex

> was not run by government appointees, was not staffed with civil servants, was not wholly owned by the government, was not immune from suit, and did not exercise any regulatory authority. Even though petitioner offers some evidence that it serves a public purpose, its high degree of independence from the government of British Columbia, combined with its lack of financial support from the government and its lack of special privileges or obligations under Canadian law dictate our holding that [Powerex] is not an organ of British Columbia.

Pet. App. 15a-16a.

That passage represents a misapprehension of both the law and the facts. The court of appeals omitted examination of numerous factors showing a high degree of interdependence

between the Province and Powerex. The court also ignored or misconstrued key elements of the relationship between the Province and Powerex, despite undisputed and overwhelming evidence on the record demonstrating that Powerex is a public entity. See pp. 9-20, *infra*.

B. Another reason for this Court to reject the mechanical "checklist" approach adopted in the decision below is that it stands in stark contrast to the broad contextual test that Canada applies to questions of foreign sovereign immunity.

The source of foreign sovereign immunity in Canada is its State Immunity Act, R.S.C., ch. S-18 (1985) ("SIA"), which was largely patterned after the FSIA. *Re Canada Labour Code*, 2 S.C.R. 50, ¶ 13 (Can. 1992). Like its American counterpart, the SIA grants immunity to "foreign states" from the jurisdiction of Canadian courts. A "foreign state" is defined by the SIA as "any political subdivisions of the foreign state, including any of its departments, and any *agency* of the foreign state." R.S.C., ch. S-18, § 2 (emphasis added). In turn, an "agency" of a foreign state is defined as "any legal entity that is an *organ* of the foreign state but that is separate from the foreign state." *Ibid.* (emphasis added). The underlying policy of the Canadian State Immunity Act, like that of the FSIA, is recognition of the principle of mutual respect between sovereign nations, as well as an acknowledgment of the delicate political and legal compromise inherent to the doctrine of international immunity.

Canadian courts have generously defined the outer limits of sovereign immunity under the SIA. The highest court in Ontario, for instance, has correctly observed that "the use of the broad word 'organ' in the [State Immunity] Act, which was promulgated to codify the application of the doctrine [of sovereign immunity] in Canada, indicates the intention of [the Canadian] [P]arliament to protect individuals and institutions who act at the request of a foreign state in situations where that state would enjoy sovereign immunity." *Walker (Litig.*

Guardian of) v. *Bank of New York, Inc.*, 16 O.R. (3d) 504, ¶ 10 (C.A. 1994) (holding that the Bank and its employees were "organs" of the United States entitled to immunity); see also *Jaffe* v. *Miller*, 13 O.R. (3d) 745, ¶¶ 31-32 (C.A. 1993) (functionaries of an agency of a foreign government were entitled to immunity under the SIA); *P.(R.)* v. *Westwood*, 2003 B.C.S.C. 1279, ¶ 19 (B.C. 2003) (same).

Like the Second, Third, and Fifth Circuits, Canadian courts have adopted a fact-specific, case-by-case approach to determining sovereign immunity, examining the circumstances of an entity's creation, as well as the entity's responsibilities and obligations under foreign law, in recognition that foreign states often use complex corporate structures or organizational models with which Canadian courts may not be familiar. In light of this reality, as the Canadian Supreme Court has observed, "a contextual approach is the only reasonable basis of applying the doctrine of * * * immunity." *Re Canada Labour Code*, 2 S.C.R. at ¶ 30; accord *Filler*, 378 F.3d at 217; *USX Corp.*, 345 F.3d at 206-214; *Kelly*, 213 F.3d at 846-848. The "lesson" to be drawn from the American model, the FSIA, is that "the proper approach to characterizing [foreign] state activity is to view it in its *entire context*." *Re Canada Labour Code*, 2 S.C.R. at ¶ 36 (emphasis added); see also *Sarafi* v. *The "Iran Afzal,"* 2 F.C. 954, ¶¶ 6, 9 (Tr. Div. 1996) (a shipping line created by the Iranian government to hold the assets of a nationalized line was an "agency" of Iran). "Rigid dichotomies" or mechanical analyses, such as the one adopted by the Ninth Circuit, are "not helpful" to the analysis of sovereign immunity. *Re Canada Labour Code*, 2 S.C.R. at ¶¶ 26, 30.

II. The Ninth Circuit's Narrow, Mechanical Approach To The FSIA Resulted In The Erroneous Denial Of "Organ" Status To Powerex

The Ninth Circuit's analysis of Powerex's entitlement to "organ" status was flawed from start to finish. Not only did the Ninth Circuit completely overlook crucial evidence in the record establishing the essentially public nature of Powerex, but the court also misapprehended key facts defining the Province-Powerex relationship.

- Powerex was created for a public purpose, and is frequently used by the Province to fulfill public obligations.

The Ninth Circuit grudgingly acknowledged "some evidence that [Powerex] serves a public purpose" (Pet. App. 16a) but virtually ignored the circumstances surrounding the birth of Powerex. In 1964 the Province passed what is now called the Hydro and Power Authority Act, R.S.B.C., ch. 212 (1996) ("Hydro Act") (Pet. App. 163a), creating a new Crown corporation that came to be known as BC Hydro. Pet. App. 50a, 162a-189a. In the 1980s, the Province undertook a massive re-structuring of BC Hydro. As part of that project, Powerex came into being in December 1988. BC Hydro, *Company History*, *available at* http://www.bchydro.com; see also Pet. App. 53a; Pet. Br. 10.

Powerex was created for one purpose: to act as the *exclusive* marketer of the Province's surplus power outside of British Columbia, for the benefit of British Columbia's citizens. Pet. App. 53a. As a wholly owned subsidiary of BC Hydro, Powerex satisfies the requirements for a government corporation under the Province's Financial Administration Act, R.S.B.C., ch. 138, § 1 (1996) ("FAA"). Therefore, Powerex is ultimately accountable to the Provincial government, making it subject to certain obligations and responsibilities. As a government entity, Powerex is also entitled to certain rights and benefits under

Provincial law that are not applicable to private businesses. See *ibid.* By structuring Powerex this way, the Province ensured that, although Powerex would have the flexibility necessary to participate actively in the energy market, in the end the Province would retain control through the series of checks and balances imposed by Provincial law on government corporations.

BC Hydro itself does not and cannot conduct any outside marketing of its surplus electricity. BC Hydro does not possess an export permit from FERC, and is thus prohibited by the National Energy Board from exporting power to the United States for money. Pet. App. 24a. As a result, the Province and BC Hydro are entirely dependent on Powerex for the outside marketing of BC Hydro's electrical products. Powerex is the sole entity in the Province with the exclusive authority to market BC Hydro's surplus energy outside of British Columbia, to western Canada and the western United States. Pet. App. 24a. BC Hydro is directed, by its sole shareholder, the Province, "*through Powerex*, [to] continue to be an active participant in extra-provincial energy trading markets." Shareholder's Letter of Expectations between The Minister Energy and Mines (as Representative of the Shareholder, the Government of British Columbia) and the Chair of the British Columbia Hydro and Power Authority, Feb. 2004 (emphasis added), *available at* http://www.gov.bc.ca/cas/down/.

Thus, Powerex works closely with BC Hydro to deliver electricity to the United States. BC Hydro transfers its surplus energy to Powerex at the British Columbia-U.S. border. Pet. App. 24a. BC Hydro's system of dams and reservoirs allows Powerex to purchase electricity on the open market during non-peak hours when prices are low and sell its own electricity supplies during peak hours. Wendy Stueck, *U.S. gives Powerex 'exoneration,'* THE GLOBE AND MAIL, at 2, Nov. 1, 2003, *available at* Westlaw, CanadaNP; see also Pet. App. 28a-29a ("[h]our-to-hour coordination takes place between the BC Hydro

operations shift engineer and the Powerex Real Time trader"). Powerex's purchases also supplement the BC Hydro system to serve domestic customers in years when rain and snow-melt inflows into BC Hydro's reservoirs are low.

Other duties carried out by Powerex underline its essentially public nature and undermine the Ninth Circuit's dismissal of Powerex as just another for-profit company. The Province has assigned Powerex its rights and obligations under the Columbia River Treaty and the Skagit River Treaty, international treaty arrangements between Canada and the United States for the effective utilization of the water resources of both nations. Pet. App. 53a-57a; see also *id.* at 61a, 138a. Specifically, the Province and BC Hydro assigned to Powerex their rights and interests under the Columbia River Treaty in the "Canadian Entitlement," Canada's half-share of surplus power produced on the Columbia River. *Id.* at. 55a. The Province and BC Hydro also assigned to Powerex the Province's responsibilities under the Skagit River Treaty concerning the transmission of power from the Province to Seattle. *Id.* at 56a-57a; see Pet. Br. 11-12.

The Province has often used Powerex to carry out other duties in the public interest. In the early 1990s the Province approved Powerex as the vehicle through which to create a domestic power exchange operation, which was intended to promote an efficient domestic market for private power. Pet. App. 54a. In addition, in 1997 the Province passed legislation giving the Provincial Government authority to define the terms under which Powerex would supply power to Provincial businesses, to "help ensure that British Columbia's electric power resources contribute to the creation and retention of jobs in British Columbia and to regional economic development." Power for Jobs Development Act, S.B.C., ch. 51, § 2 (1997); see also Pet. App. 55a-56a, 193a.

- Powerex is a wholly owned subsidiary of BC Hydro, which in turn is wholly owned by the Province.

Foreign sovereigns must have the necessary flexibility to use different forms of corporate organization; foreign methods of corporate structure may, however, be unfamiliar to American courts. The use of the broad term "organ" in the FSIA shows that Congress was cognizant of this reality, and intended to accommodate (to some degree) the need for foreign states to organize their corporate affairs according to their own methods. Accordingly, it should not be held against the Province that it chose to use its Crown corporation, BC Hydro, as a corporate middleman that would own Powerex.

To the puzzlement and dismay of the Province, the Ninth Circuit deemed it significant that Powerex "was not wholly owned by the [foreign] government." Pet. App. 15a-16a. This is a factual distortion, as the Province *does* wholly own Powerex, albeit through an intermediate sovereign entity: Powerex is a fully owned subsidiary of BC Hydro, which is a Crown corporation and an agent of the Province. Hydro Act, R.S.B.C., ch. 212, § 3(1). All of BC Hydro's property in turn belongs to the Province. *Westbank First Nation* v. *British Columbia Hydro & Power Auth.*, 154 D.L.R. (4th) 93, ¶¶ 12-13 (C.A. 1997) (property of BC Hydro is held as "the interest of the Crown in right of British Columbia and immune from taxation"), *aff'd*, 3 S.C.R. 134 (1999). The Ninth Circuit confused the *directness* of ownership (arguably absent here) with the *completeness* of ownership (indisputably present here).

In any event, the Ninth Circuit's conclusion that Powerex's ownership structure cuts *against* conferring "organ" status is also a distortion of the law. Incomplete ownership by the foreign government cuts against only the "majority ownership" determination under Section 1603(b)(2) of the FSIA. 28 U.S.C. § 1603(b)(2) (defining an "agency or instrumentality of a foreign state" as "any entity * * * which is an organ of a foreign state or

a political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or a political subdivision thereof"); see also *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 473-74 (2003) ("indirect subsidiaries" of a foreign state do not meet the standard of majority ownership under Section 1603(b)(2)). But an "organ" determination under the FSIA is an altogether separate inquiry. It is unnecessary even to consider whether an entity is an "organ of a foreign state" if a court determines that it meets the independently sufficient statutory criterion that "a majority of [its] shares or other ownership interest is owned by a foreign state or political subdivision thereof," so suggesting that a failure to meet the latter criterion is a factor cutting against "organ" status makes no sense.

Before the decision below, the Ninth Circuit had correctly recognized – as had the Third Circuit – that complete but indirect ownership by the foreign sovereign weighs heavily *in favor of* "organ status." See *EOTT Energy*, 257 F.3d at 997 ("[i]n *Corporacion Mexicana de Servicios Maritimos v. M/T Respect*, 89 F.3d 650 [,655] (9th Cir. 1996), we held that a Mexican oil refinery was an organ where it was entirely owned by the government [through a direct subsidiary of the government]"); *USX Corp.*, 345 F.3d at 213 (where foreign government had "complete control over all [the subsidiary's] shares * * *, albeit through a tiered arrangement," this factor "weighs in favor of a finding of organ status"). Those prior holdings recognized that tiered but complete ownership arrangements, such as the Province's ownership of Powerex, counsel strongly in favor of finding organ status even if they do not pass the FSIA's "majority ownership" test. Thus, the Ninth Circuit's erroneous transposition of the majority-ownership test and the "organ" test transformed a factor that should have favored Powerex into one that worked heavily against it in the "organ" analysis.

- Powerex enjoys numerous special privileges under Canadian law.

In denying Powerex "organ" status, the court relied on the fact that Powerex "was not immune from suit" in Canada to justify the denial of "organ" status. Pet. App. 15a. It is true that Powerex is not immune from suit in Canada. As Powerex is not, however, claiming immunity in the *United States* under the FSIA (because it clearly falls within the "commercial activities" exception to immunity), but is instead claiming the protections the FSIA gives a foreign state *even when it is not immune*, Powerex's lack of immunity in Canada should be accorded no significance. See U.S. Cert.-Stage Br. 10 n.4. And that is particularly so in light of the overwhelming evidence on the record establishing that Powerex holds special status under Canadian law.

To start, Powerex's profits are wholly exempt from both federal and provincial taxes, an advantage that private companies do not enjoy. The Constitution Act of Canada holds that "[n]o Lands or Property belonging to Canada or any Province shall be liable to Taxation." Constitution Act, 1867, 30 & 31 Vict., ch. 3, *reprinted in* R.S.C. 1985, App. II, No. 5, § 125 (Pet. App. 58a, 161a). As a Province-owned corporation, Powerex does not have to pay taxes.

Further benefits flow from Powerex's status as a public entity of the Province. Under the Financial Administration Act, Powerex, like all government corporations, can receive loans from the Province's Ministry of Finance, and is also eligible to have its debt obligations assumed by the Province. R.S.B.C., ch. 138, §§ 53, 56.3. Powerex also qualifies under Provincial law to receive insurance and risk management services from the Ministry of Finance. *Id.* § 30. Finally, unlike employees of private energy companies, Powerex's employees can participate in BC Hydro's retirement plan. JA247-248. The numerous advantages that Powerex enjoys by virtue of its relationship to the

Province and its status as a government corporation make it clear that the Ninth Circuit was simply wrong when it said that Powerex did not benefit from any "financial support" from the Province or "special privileges" under Canadian law. Pet. App. 16a.

- Powerex is subject to extensive Provincial supervision.

Numerous undisputed facts further lemonstrate the degree to which the Province, BC Hydro, and Powerex are intertwined. Powerex is subject to multiple statutory restraints. As a government corporation, Powerex is subject to any regulations and directives passed by the Provincial Treasury Board applicable to government corporations. See, *e.g.*, FAA, R.S.B.C., ch. 138, § 4.1 (in relation to capital expenditures). The Province can also impose restrictions on the circumstances under which Powerex can, for example, enter banking arrangements, lend or borrow money, or give guarantees and indemnities. *Id.* § 75(1)(a); see also *id.* § 79.3 (government corporations prohibited from entering into commodity derivative transactions unless permitted by a Treasury Board regulation and subject to any conditions imposed by such a regulation).

Powerex is also subject to financial disclosure obligations that are inapplicable to private sector companies. Because Powerex is a wholly owned subsidiary of BC Hydro, its financial information must be included in BC Hydro's statutorily mandated financial disclosures. Financial Information Regulation, B.C. Reg. 371/93, § 1 (1993); see also Budget Transparency and Accountability Act, R.S.B.C., ch. 23, §§ 13, 16 (2000) ("BTAA") (Powerex's activities are included in BC Hydro's service plans and service plan reports required to be made public by the responsible Provincial government minister each fiscal year). In addition, Powerex's books can be examined and reported on by the Province. FAA, R.S.B.C., ch. 138, § 8(2)(c)(ii); Financial Information Act, R.S.B.C., ch. 140, § 4 (1996); BTAA, R.S.B.C., ch. 23, § 20. Powerex's auditor is appointed in accordance with a plan approved by a committee of

the Provincial Legislative Assembly. Auditor General Act, R.S.B.C., ch. 2, § 10 (2003). The Auditor General, an officer of the Provincial Legislature, may, in certain circumstances, be required to report to the Provincial Legislative Assembly on aspects of Powerex's financial operations, including whether Powerex is "operating economically, efficiently and effectively." *Id.* § 11(8).

The Province also imposes employment policies on Powerex. The Province's Lieutenant Governor in Council directly appoints BC Hydro's board of directors, which in turn appoints the Powerex board. Pet. App. 58a-59a. The Province and BC Hydro exercise a high degree of supervisory power over Powerex through a host of management controls, including Provincial authority to approve the appointment of any outside directors to Powerex's board. JA233-235, 248. In addition, the Province supervises Powerex by establishing a BC Hydro risk management committee to outline the criteria for all Powerex transactions and recommend approval of trades falling outside those criteria; the Assistant Deputy Minister of the Provincial Treasury, an employee of the Province's Ministry of Finance, participates in the committee. See Pet. App. 28a, 59a. Powerex must also comply with Provincial guidelines for public employee compensation. JA241-242. Finally, BC Hydro acts as Powerex's treasurer and payroll agent. Pet. App. 59a.

- The Province benefits from any revenues generated by Powerex, which are integrated into the profits of BC Hydro.

Powerex's profits are not "private" profits in any relevant sense; rather, they are consolidated with the profits of BC Hydro. See JA215; see also BC Hydro, *2006 Annual Report,* at 83 (May 2006) ("The consolidated financial statements include the accounts of BC Hydro and its principal wholly owned operating subsidiar[y] Powerex Corp"), *available at* http://www.bchydro.com. The Province directs BC Hydro as to the method for the payment of income to the Province, which includes the

consolidation of net income from Powerex. See Special Directive No. HC1 to the British Columbia Hydro and Power Authority, Order of the Lieutenant Governor in Council No. 1125, § 3 (Nov. 27, 2003); see also JA215 (Province directs BC Hydro to pay directly to the Province up to 85% of its consolidated net income, which includes all of Powerex's income). Under the Budget Transparency and Accountability Act, applicable to Powerex as a "government organization," Powerex's actual and forecast revenues and expenses, along with those of BC Hydro, are consolidated into the Province's budget, quarterly reports, and financial statements. See BTAA, R.S.B.C., ch. 23, §§ 1, 5-6, 9-10.

Furthermore, as befitting a government company that is ultimately accountable to the public, Powerex follows a "conservative risk profile * * * defined through limits that are regularly reviewed by both the Powerex and BC Hydro Boards of Directors." BC Hydro, *2005 Annual Report*, at 81 (June 2005), *available at* http://www.bchydro.com. Likewise, at the time of removal BC Hydro set aside revenue (including profits from Powerex) in a "Rate Stabilization Account," from which BC Hydro drew in low-profit years to maintain low consumer prices. See BC Hydro, *2001 Annual Report*, at 11 (June 2001), *available at* http://www.bchydro.com. Thus, due in part to "trade activity from Powerex," BC Hydro's consumer rates did not rise from 1993 until 2004, when the Province's Utilities Commission authorized a modest 4.85% increase. British Columbia Utilities Commission, *In the Matter of British Columbia Hydro and Power Authority 2004/05 to 2005/06 Revenue Requirements Application and British Columbia Transmission Corporation Application for Deferral Accounts*, at 67 (Oct. 29, 2004), *available at* http://www.bcuc.com. Powerex's projected income also plays into the Province's calculations in setting BC Hydro's utility rates. JA215, 238. Thus, Powerex's activities have resulted in lower consumer rates and more affordable electricity for British Columbians.

Powerex's profits also represent a significant contribution to Provincial coffers. In 2000-01, for example, Powerex helped BC Hydro achieve almost $4.5 billion in revenue, which made up 69% of BC Hydro's total revenue for the 2001 fiscal year. Scott Simpson, *Market fired Powerex bonanza*, VANCOUVER SUN, at 1, May 18, 2002, *available at* Westlaw, PapersCan.

The financial interdependence between BC Hydro and Powerex also means that any business losses incurred by Powerex will ultimately be suffered by the Province's citizens, who are, in the end, the owners of BC Hydro and Powerex. In 2003, as the sole shareholder of BC Hydro, the Province recorded a potential $820 million liability on its books to account for the string of lawsuits in California against Powerex. Michael McCullough, *Olympics brings cheer to otherwise troubled year*, VANCOUVER SUN, at 3, Dec. 31, 2003, *available at* Westlaw, PapersCan; see also BC Hydro, *2006 Annual Report*, at 95 (noting that "BC Hydro is also exposed to credit risk as a result of the trade activities of Powerex"). Powerex's legal costs are likewise absorbed by BC Hydro and, in the end, the Province. As of 2003, BC Hydro and Powerex had expensed approximately $25 million in legal costs incurred in defending Powerex. BC Hydro, *2003 Annual Report*, at 95 (July 2003), *available at* http://www.bchydro.com; see also BC Hydro, *2006 Annual Report*, at 99 ("BC Hydro has recorded provisions for uncollectible amounts and legal costs" relating to the debts owed by California to Powerex, dating back to the 2001 California energy crisis).

Given the high degree of financial integration between the Province and Powerex, it is hardly surprising that members of the Provincial government treat Powerex as a government company, and are held accountable through the political process for Powerex's actions.[2] Indeed, the Ninth Circuit's conclusion

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[2] See, *e.g.*, Official Report of the Debates of the Legislative Assembly

that Powerex is an independent and private company with a "high degree of independence from the government of British Columbia" (Pet. App. 16a) would flabbergast the Province's Legislative Assembly, which believes that "[t]he management of Powerex will make decisions in the best interests of British Columbians, in the best interests of BC Hydro, and in the best interests of keeping rates low across the province on where to buy electricity." Official Report of the Debates of the Legislative Assembly (Hansard), 38th Parliament, 2d Session, at 3934 (Apr. 24, 2006).

As this record clearly shows, the Ninth Circuit's refusal to grant "organ" status under the FSIA to Powerex was based on a mischaracterization of the nature of the entity and a fundamental misunderstanding of its treatment and status under Canadian law. A context-sensitive test broadly construing organ status, applied to an accurate understanding of Powerex's role in Provincial affairs, accords "organ" status to Powerex, and recognizes Powerex's entitlement to the FSIA's procedural protections.[3]

(Hansard), 36th Parliament, 5th Session, at 17718 (Apr. 9, 2001) (Provincial legislative assembly demanding answers from the Province's Minister of Energy, Mines and Petroleum Resources about the outstanding debts owed to Powerex from its California sales of electricity); Official Report of the Debates of the Legislative Assembly (Hansard), 34th Parliament, 4th Session, at 11368 (July 24, 1990) (Provincial legislative assembly requesting information on "what actions the Minister has taken to ensure that BC Hydro's domestic customers are not put at risk through the activities of Powerex"); see also JA233 (Powerex's CEO explaining that "Provincial government representatives * * * were continually questioned by their constituents as to why an agency of the Crown [Powerex] was continuing to sell power into California").

[3] The Ninth Circuit's decision also conflicts with Article 1102(1) of the North American Free Trade Agreement, which prohibits discrimination among member countries. NAFTA Art. 1102(1), 32 I.L.M. at 639. The

III. Applying Section 1447(d) to Cases Removed Under the Foreign Sovereign Immunities Act Would Expose Foreign States to Prejudice, Impair Foreign Relations, and Undermine Congress's Comprehensive Scheme for Transferring to the Federal Courts Issues of Foreign Sovereign Immunity

Appellate review of orders remanding suits removed under the FSIA is crucial to the protections that Congress has provided to foreign states and their instrumentalities. The FSIA guarantees, in particular, that foreign governmental entities will receive preferential, uniform treatment in the federal courts in respects that Congress has specified. Applying the jurisdictional bar of 28 U.S.C. § 1447(d) would deny that treatment based on nothing more than a single district judge's *erroneous* determination that a defendant is not an agency or instrumentality of a foreign state. Such a result would be deleterious to the interests of the Province and every other foreign sovereign. And it is not required by, or even consistent with, this Court's precedents.

A. Section 1447(d) provides that "[a]n order remanding a case * * * is not reviewable on appeal or otherwise," and generally bars appeals of remand orders issued under 28 U.S.C. § 1447(c). See *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976). By its very nature, Section 1447(d) shields from appellate review erroneous remand orders as well as correct ones. That inherent downside to the jurisdictional bar is counterbalanced in other contexts by gains in judicial economy.

Province agrees with the arguments in petitioner's brief (at 38-39): By treating substantially similar entities such as the Bonneville Power Administration and the Western Area Power Administration as sovereign entities while denying sovereign status to Powerex, the court accorded more favorable treatment to Powerex's American counterparts, thus discriminating between functionally similar domestic and foreign investors, in violation of NAFTA.

See *Kircher* v. *Putnam Funds Trust*, 126 S. Ct. 2145, 2152 (2006) (Section 1447(d) avoids "'prolonged litigation of questions of jurisdiction.'") (quoting *United States* v. *Rice*, 327 U.S. 742, 751 (1946)).

But Section 1447(d)'s downside would be especially severe in the FSIA context, where federal jurisdiction serves a uniquely important purpose. Specifically, to eliminate the threat of "local bias in civil caselaw involving foreign states," *In re Texas Eastern Transmission Corp.*, 15 F.3d at 1239, the FSIA guarantees foreign entities the right to bench trials in federal court, see 28 U.S.C. § 1441(d). In enacting that guarantee, Congress understood that "extinguish[ing] a demand for a jury trial" is a foreign entity's only sure protection against bias. H.R. Rep. No. 94-1487, at 33 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6632.

Bias is insidious; it can be triggered simply by a plaintiff's allegations – such as the present claim that Canadian companies abused blackout conditions that affected numerous Californians – rather than by explicit appeals to prejudice. A defendant, therefore, can reasonably harbor only a faint hope of successfully challenging a verdict tainted by prejudice. Moreover, because neither this Court nor state courts will revisit the basis for federal jurisdiction once state proceedings have begun, see *Metropolitan Cas. Ins. Co.* v. *Stevens*, 312 U.S. 563, 568-69 (1941); *In re TMI Litig. Cases Consol. II*, 940 F.2d 832 (3d Cir. 1991) (collecting cases from Oregon, Alabama, and Oklahoma), applying Section 1447(d) in the FSIA context would turn a single district court proceeding into a foreign entity's one and only opportunity for insulation from bias against foreign states.

In addition to inappropriately weakening the FSIA's protections for individual defendants, barring appellate review of FSIA remand orders would also needlessly damage U.S. foreign policy. Foreign relations "might be seriously affected if an American jury * * * displayed * * * bias in a lawsuit against an instru-

mentality of [a foreign] government." *Universal Consol. Cos., Inc.* v. *Bank of China*, 35 F.3d 243, 246 (6th Cir. 1994). Just as important, foreign policy would be impaired even by lawsuits that do *not* result in tainted verdicts. The FSIA's removal provision "spare[s] [foreign states] the affront * * * [of] being judged by a jury of laymen" – a nontrivial concern, given that "few foreign countries have civil juries." *In re Linee Aeree Italiane (Alitalia)*, 469 F.3d 638, 640 (7th Cir. 2006) (Posner, J.).[4]

Moreover, "the [FSIA] nonjury provision was intended to promote 'uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences.'" *Bank of China*, 35 F.3d at 246 (quoting H.R. Rep. No. 94-1487, *supra*, at 13, 1976 U.S.C.C.A.N. at 6611). "Uniformity in decision" assures each foreign state that its FSIA protections will be predictable and no weaker than the protections afforded every other foreign state. That uniformity will be impossible to attain, however, if the FSIA's protections are subject to the unreviewable, atomistic determinations of the federal district courts. Unless those determinations can be appealed, the primary purposes of the FSIA's removal provision – establishing respectful, uniform treatment of foreign states that insulates them from prejudice – will be undermined.

B. Section 1447(d) does not mandate the unraveling of this or any federal statutory scheme. Rather, as this Court recently explained, Section 1447 must be "read together with * * * later enacted" provisions concerning federal jurisdiction, such as the FSIA's removal provision. *Osborn* v. *Haley*, 127 S. Ct. 881, 895

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[4] The Province, unlike many other non-U.S. jurisdictions, does have civil juries. See British Columbia Supreme Court Rules, Civil Rules 39(24) - (26), B.C. Reg. 221/90. But the construction of Section 1447(d) this Court adopts in this case will apply to *all* foreign sovereigns.

(2007).[5] *Osborn* addressed the Westfall Act's certification provision, which states that, in lawsuits seeking recovery from the United States for the conduct of federal employees acting within the scope of office of employment, "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal." 28 U.S.C. § 2679(d)(2). Quite obviously, that provision "renders * * * dispositive" the Attorney General's certification of a federal employee's scope of office or employment for purposes of establishing the United States' right to removal under the Westfall Act. *Osborn*, 127 S. Ct. at 894. But *Osborn* did more than simply acknowledge that it is error for a district court to issue a remand order in spite of a Section 2679(d)(2) certification. Rather, the Court also held that, to give "'conclusive'" effect to the Attorney General's prerogative to determine federal jurisdiction, certification under Section 2679(d)(2) must "*prevail*" over the Section 1447(d) jurisdictional bar. *Ibid.* (emphasis added). Thus, the Court held that a remand order contradicting the Attorney General's certification is not only erroneous but also *appealable*.

Like the Westfall Act, the FSIA also reflects a congressional determination that suits implicating sovereign interests should reside exclusively in the federal courts. The Westfall Act expresses that determination through a targeted grant of authority to the Attorney General, whom it empowers to define the scope of federal employment "for purposes of removal" only. 28 U.S.C. § 2679(d)(2). The FSIA, meanwhile, effects a broader transfer of authority to the federal judiciary as a whole, which the FSIA tasks with adjudicating the bounds of sovereign

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[5] The FSIA was enacted in 1976, whereas the bar to appellate review of remand orders dates to 1887. See *Thermtron*, 423 U.S. at 343. It is inconceivable that the jurisdictional bar was intended to encompass cases removed by foreign states, given that suits against foreign sovereigns were unknown to the common law. See *Ruggiero* v. *Compania Peruana de Vapores Inca Capac Yupanqui*, 639 F.2d 872, 880-881 (2d Cir. 1981).

immunity. Indeed, the FSIA's overarching purpose is "to channel cases against foreign sovereigns away from the state courts and into federal courts." *Verlinden*, 461 U.S. at 497.

"[T]he jurisdictional provisions of the [FSIA] are simply one part of this comprehensive scheme." *Verlinden*, 461 U.S. at 496. It is no accident, therefore, that the purposes of the FSIA's nonjury removal provision – ensuring fair, consistent treatment of foreign sovereigns – mirror the reasons for the FSIA's broader command that the Judicial Branch field all questions concerning foreign sovereign immunity. See 28 U.S.C. § 1602 ("The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts."); H.R. Rep. No. 94-1487, *supra*, at 7, 1976 U.S.C.C.A.N. at 6606 ("A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made purely on legal grounds and under procedures that insure due process."); *Nolan* v. *Boeing Co.*, 919 F.2d 1058, 1065 (5th Cir. 1990) ("[T]he intent of the FSIA was to render uniform in procedure and substance the treatment of foreign sovereigns subjected to suits in American courts. Assuring the availability of a federal forum was intended to further these goals, to which a broad removal provision contributed.") (citing 14 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 3662, at 394 (1984)).

The FSIA's channeling of sovereign immunity questions to the federal courts is powerful evidence that the FSIA's removal provision must prevail over any postulated inconsistent reading of Section 1447(d). Cf. *Osborn*, 127 S. Ct. at 896 ("Only in the extraordinary case in which Congress has ordered the intercourt

shuttle to travel just one way – from state to federal court – does today's decision hold sway."). Whereas Section 1447(d) is designed to avoid protracted litigation concerning the grounds for federal jurisdiction, the FSIA's aim is just the opposite; it *encourages* extensive litigation in federal court concerning substantive questions of foreign sovereign immunity – including the question whether a defendant is an organ of a foreign state entitled to a bench trial in federal court. Applying Section 1447(d)'s jurisdictional bar, therefore, would contravene Congress's express purpose by permitting foreign entities to be shuttled into state court through a statutory back door. Congress could not have intended that remarkable result; and, as interpreted by *Osborn* and its predecessors, Section 1447(d) does not require it.[6]

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[6] In the procedural posture of this case, Section 1447(d) does not apply to the district court's remand order for the additional reasons stated by petitioner: there was no defect in subject-matter jurisdiction at the time this case was removed from state court, and the district court in fact did not lose subject-matter jurisdiction after resolving the sovereign immunity issues concerning defendants other than Powerex. The Province addresses the broader issue of the statutory interplay between Section 1447(d) and the FSIA, however, because foreign sovereigns such as the Province are in need of a clear statement from this Court that they and their "organs" may appeal erroneous remand orders by district courts.

CONCLUSION

The judgment of the court of appeals for the Ninth Circuit should be reversed to the extent that it held that the district court properly remanded this case to state court because Powerex is not a "foreign state" protected by the FSIA.

Respectfully submitted.

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